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ABSTRACT

This report examines the history of special education services in New York City schools in the context of changing perceptions of children with disabilities (from assuming that they should be segregated and cannot contribute to society, to recognizing that inclusion, equality, and achievement are necessary for these children to become productive members of society). Eight sections examine: (1) "Introduction"; (2) "Where We Have Been" (from exclusion to mobilization, Section 504 and the Education of All Handicapped Children Act, amendments and judicial construction, and New York City history); (3) "Jose P."; (4) "Where We Are Now" (placement in the least restrictive environment, or LRE, New York City's rate of special education classification, and educational outcomes); (5) "Over-Representation of Minorities in Special Education and in the Most Restrictive Placements" (disproportionate referral, classification, and placement in restrictive environments); (6) "The Least Restrictive Environment Mandate" (benefits of education in the LRE and New York's response to the LRE mandate); (7) "New York City's Movement toward Education in the LRE" (District 75 Office of Inclusive Education and the LRE Initiative 1996-00); and (8) "The New Continuum of Special Education Services" (the pre-existing continuum, the new continuum service delivery options, and implementing the new continuum). (Contains 10 tables and 173 footnotes.) (SM)

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Still Waiting, After All These Years...

Inclusion of Children with Special Needs in New York City Public Schools

REPORT OF THE LEAST RESTRICTIVE ENVIRONMENT COALITION

New York, New York

November, 2001

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November, 2001

Participating Organizations: Advocates for Children of New York Inc.; Bronx Legal Services; Citizens' Committee for Children of New York, Inc.; The Cooke Center for Learning and Development; The Learning Disabilities Association of New York City; The Legal Aid Society, Juvenile Rights Division; Legal Services for Children, Inc.; MFY Legal Services, Inc.; New Alternatives for Children, Inc.; New York Lawyers for the Public Interest; New York Legal Assistance Group; New York State Protection and Advocacy Program for the Developmentally Disabled; Queens Legal Services Corp.; Resources for Children with Special Needs, Inc.; The Metropolitan Parent Center of Sinergia, Inc.; South Brooklyn Legal Services.

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Still Waiting, After All These Years...

Inclusion of Children with Special Needs in New York City Public Schools

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Still Waiting, After All These Years... Inclusion of Children with Special Needs in New York City Public Schools

Who We Are

The Least Restrictive Environment (LRE) Coalition is made up of seventeen groups serving New York City school children. Our member agencies are: Advocates for Children of New York, Inc.; Bronx Legal Services, Citizens' Committee for Children of New York, Inc.; the Cooke Center for Learning and Development; the Learning Disabilities Association of New York City; the Legal Aid Society, Juvenile Rights Division; Legal Services for Children, Inc.; MFY Legal Services, Inc.; New Alternatives for Children of New York, Inc.; New York Lawyers for the Public Interest; New York Legal Assistance Group; New York State Protection and Advocacy Program for the Developmentally Disabled; Queens Legal Services Corporation; Resources for Children with Special Needs, Inc.; the Metropolitan Parent Center of Sinergia, Inc.; and South Brooklyn Legal Services.

LRE Coalition members advocate on behalf of individual children with disabilities and their families with the New York City Board of Education, the New York State Education Department, and the United States Department of Education to enforce the LRE requirements of New York and federal law. The LRE Coalition was formed in 1999.

The mission of the Coalition is to assure that all students with disabilities are educated in the LRE appropriate for each child so that all students can learn to their fullest capacity. We seek to insure that, whenever appropriate, students with disabilities are provided with the supports, services, and physical accommodations they need to progress in the general education curriculum in general education classes in their neighborhood schools.

Acknowledgments

This report is the product of the LRE Coalition as a whole. Special thanks must go to Jacquelyn Kamin who spent months poring over and interpreting data and conducting in-depth research and writing for this report. Bethany Berger of Advocates for Children also put in many hours writing and editing this report. Thanks to all the Coalition members who reviewed and contributed to the report.

This report could not have been written without the funding of the Donors' Education Collaborative, for which we are deeply grateful.

EXECUTIVE SUMMARY

In New York City, the majority of children receiving special education services spend most of their school day in segregated placements, where they are often poorly prepared for educational success and integration into their communities. In these settings, they are typically provided with little access to either the material taught to children in general education classes or the instructional methodologies necessary to enable them to learn. As a result, educational outcomes for children with disabilities are dismal. Once students are classified as needing special education services, only a small fraction is ever declassified. Teenagers receiving special education services are four times as likely to exit special education by dropping out than by receiving a regular diploma, and are currently more likely to die between the ages of 14 and 21 than to receive a Regents diploma.

Minority children are disproportionately subject to this educational dead end. African American and Latino children continue to be significantly overrepresented in restrictive segregated placements. African American children are almost twice as likely as White students to be educated in restrictive, segregated placements. They are almost three times as likely to be recommended for such placements on their initial referral to special education, while Latino students are over two times as likely. English Language Learners are twice as likely as other children to be referred to special education.

After a long, dismal history of segregating children with special needs, New York City is finally poised to implement a new Continuum of Special Education Services that has the potential to make real the promise of the federal Individuals with Disabilities Education Act—that, to the maximum extent appropriate, children with disabilities receive an equal opportunity to learn alongside children without disabilities. It also, however, has the potential to perpetuate the second-rate education that too many children with disabilities have historically received, by dumping them in general education without adequately addressing their special needs. While recommendations for new Continuum services began last school year, new Continuum recommendations are being implemented starting in September 2001.

It is the hope of the LRE Coalition, which has authored this report, that by presenting a picture of where the New York City school system has been, where it is now, and our recommendations for moving toward a better system for educating children with disabilities, we will help move the City's schools in the right direction towards inclusion and achievement under the new Continuum initiative.

In examining where we have been, this report looks at the history of special education services in the New York City school system, particularly through the lens of changing perceptions and understanding regarding children with disabilities: from the assumption that children with disabilities should be segregated from other children and cannot contribute to society, to the recognition that inclusion, equality, and achievement are all possible and necessary for these children to become the productive members of society.

The State Of Special Education In New York City

New York City still lags behind both the state and the nation by placing a majority of students with disabilities in segregated settings. While the City is making some progress toward including more students in less restrictive environments, educational outcomes for children with disabilities are bad and getting worse—more students are dropping out and even fewer are receiving diplomas. Despite much attention to racial and ethnic disparity in special education over the last decade, minority students and English Language Learners continue to be significantly overrepresented in certain classifications and in restrictive settings, with few signs of improvement. New York has much to achieve before it can offer children with disabilities the inclusive and quality education they deserve.

Placement in the Least Restrictive Environment

- In the 2000-01 school year, more than half (54%) of school aged special education students in New York City spent more than 60% of their time in a self-contained class in a regular school or separate facility for children with disabilities. One in eleven students (8.8%) were in wholly separate facilities and only 45.3% spent 20% or less of their time outside of a general education classroom.

- In 1997-98, children in New York City were 31% more likely than the average child in New York State to be receiving special education in a segregated setting most of the day, and 2.36 times more likely than the average child in the United States: while nationally, only 24.54% of children with disabilities spent more than 60% of the day in a segregated setting, 57.84% of children in New York City did.

- An area of significant progress has been the inclusion of preschool age students. The state percentage of preschool students served in integrated settings increased substantially, to 55.5% in 1999-00 from 32.3% in the 1995-96 school year. The State's preschool declassification rate has increased, from 10% in 1995-96 to 16% in 1999-00; while New York City lagged behind with a declassification rate of 11%, it still demonstrated marked improvement.

Educational Outcomes

Referral

- Once referred for an evaluation for eligibility for special education services, a child is likely to be classified as having a disability and recommended for special education services. Once a child receives special education services, s/he is unlikely to leave the special education system. In 1999-00, New York City declassified fewer school-aged special education students (2.1%) and fewer

preschool special education students (11%) than any other district in the State, regardless of need category.

Graduation

- Outcomes are far worse for students receiving special education services than for those in general education. The Board of Education 1999-2000 report on outcomes for high school students demonstrates that among students in general education settings (including both general education and special education students) 49.9% had graduated after four years, while only 1.7% of students in District 75 programs and only 7.4% of students in high school based segregated classes had. In other words, students in self-contained classes were seven times less likely to graduate in four years, and students in District 75 programs were twenty-nine times less likely to do so.

Dropping Out

- Educational outcomes are not improving, but have gotten worse over the last three years. In 1999-2000, students classified as needing special education services ages 14-21 were nearly four times more likely to exit special education by dropping out than by receiving a regular high school or high school equivalency diploma. Only 51 students, less than 0.1% of the 9,173 high school age students receiving special education services leaving the school system in 1999-00, received Regents diplomas.

- The "event-drop out rate"—the percentage of all students enrolled dropping out in any one year—was 48% higher for students classified as needing special education services than it was for general education students. Dropout rates, moreover, are increasing for all students, rising from 15.6% in 1998 to 19.3% in 2000, the highest point in the last eight years. Drop out rates for students with disabilities in segregated classes are increasing even faster, rising 3.5% compared to the 1.8% increase for all students.

Overrepresentation of Minorities in Special Education and in the Most Restrictive Placements

- Last spring, the New York State Education Department notified the New York City Board of Education that there was racial and ethnic disproportionality in the (1) identification of school-age students as disabled or in the identification of students by particular disabilities; (2) placement of preschool students with disabilities in separate settings; and (3) placement of school-age students with disabilities in more restrictive settings.

Disproportionality in Referral

- In 1999-2000, English Language Learners (ELLs) were more than twice as likely as other students to be referred to special education: 7.2% of ELLs were referred to special education, as against only 3.2% of non-ELLs.

- In 2000-2001, Black students composed 38.9% of the special education population, and 34% of the general education population, with a 12% overrepresentation rate.

- In 1999-2000 Hispanic students were overrepresented by 6.6%, composing 38.9% of the general education population, but 41.5% of the special education population.

Disproportionality in Classification

- Black students are 40% more likely than White students to be classified as mentally retarded.
- Hispanic students are 25% more likely than other students to be classified as having a speech/language disability, suggesting that evaluators are reacting to English language ability, rather than disability.
- Black students are twice as likely as White students to be classified as emotionally disturbed, making up 52.99% of all students so classified.

Disproportionality in Placement in Segregated Environments

- In 2000-2001, among students in special education, Black students were 85% more likely than White students to be placed in a self-contained class in a public school; Hispanic students were 73% more likely.
- White students were 49% more likely than Black students to be in a regular class for 20% or more of the day, and 29% more likely than Hispanic students.
- White students, however, were far more likely to attend private special education schools—White students were 3.4 times more likely to attend these schools than Black students, and 4.6 times more likely than Hispanic students.

Poised On The Brink Of A New Continuum

New York City is on the verge of a fundamental restructuring of this system for educating children with disabilities. Last year the New York City Board of Education (the Board) adopted a revised Continuum of Special Education Services (the new Continuum) that affirms the right of every student to be educated in the least restrictive environment (LRE) for that child.

This year, with the implementation of the new Continuum, New York City is poised to revolutionize special education by ending the unnecessary segregation of public school children with special needs from their friends and siblings in general education.

By careful planning and implementation of the City's new Continuum, New York City could put an end to much of the stigma and hopelessness felt by the thousands of children with special needs who have traditionally been educated in dead-end, segregated settings. If properly carried out, New York's "Continuum of Services" will work a revolution in our system of public education. This is an opportunity for all of our school children that we cannot afford to miss.

Implementation of the City's new Continuum is still in its early stages; it is critical at this crossroads that it be done right. If the Continuum is implemented wisely it will benefit all children with and without disabilities. No one imagines that this transition will be easy. However, some pitfalls can be anticipated and avoided as the Board of Education begins this new approach to educating all students.

CONCLUSION AND RECOMMENDATIONS

The New York City Board of Education's new Continuum offers an opportunity for all children to receive a quality education together, to the benefit of all. In the new Continuum, the Board espouses a policy committed to educating each child in his/her LRE, with appropriate services, supports and accommodations. For the Board to succeed in moving students into the least restrictive settings appropriate to meet their needs, the new Continuum must be implemented with adequate resources and appropriate staffing, sufficient professional development to support teachers, information to ensure parents of children with disabilities are informed about their children's educational needs and services, and sufficient outreach to all parents to create a welcoming atmosphere for all children. System oversight by an informed and supportive administration is critical.

The LRE Coalition looks forward to working with the New York State Department of Education, the New York City Board of Education, school administrators, teachers, parents and other advocates to support the effective implementation of the new Continuum for the benefit of all children. To that end, and in furtherance of the creation of a school system that delivers a sound, appropriate education to all of its students, the Least Restrictive Environment Coalition makes the following specific recommendations:

I. WELL-TRAINED STAFF ARE NECESSARY TO ENSURE SUCCESSFUL IMPLEMENTATION OF THE NEW CONTINUUM

A Comprehensive System of Personnel Development: The New York State Education Department should develop a system of personnel development adequate to ensure that there is a sufficient supply of trained teachers and professionals to meet the needs of children with disabilities in New York City.

Training to Prepare General and Special Education Teachers to Teach in Inclusive Settings: Training in classroom management, identification of learning disabilities, collaborative teaching and research-based pedagogy for the inclusive classroom must be given pre-service and as on-going professional development.

Training Designed to Prepare General Education Teachers to Teach Students with Special Needs: New York State should broaden the range of requirements for general education teaching certification to incorporate training geared toward teaching students with special needs, including behavior management techniques and research-based methods of teaching differently-abled learners.

Principals and other administrators must be trained in the theory and practice of inclusive education, including efficient staffing: This training must be given to new administrators and must be part of wide-spread, on-going professional development of existing school system staff.

Training Designed to Improve the Quality of Special Education Teachers & Providers: The State should require that special education certified high school teachers also become certified in a particular subject area(s), to bring them in line with general education high school teachers.

Paraprofessionals' training must include strategies for collaborating with the teacher and working with students with different disabilities: All school staff must be trained in effective behavior management.

School-Based Behavior Management Training That is Mandatory for All School Staff: Teachers should be required to participate in significant behavior management training programs in order to become certified. Schools should implement currently available cost-effective, research-based programs designed to provide building-level training for teachers, school aids, and school administration to assist them in managing children's behavior.[1]

Professional Development in Research-Based Methodologies and Strategies for Reading Instruction:
Teaching reading effectively to diverse general education students and students with special needs requires teachers to be able to adapt curricula appropriately. All teachers must learn the most successful methods of teaching reading to struggling students.

Professional Development for Board of Education Evaluators: Evaluation personnel must be trained in effective testing for all disabilities and for recommending specific instructional strategies for meeting individual goals.

Provision of Mentoring and Technical Assistance: The use of master teachers and mentors with expertise in teaching in a diverse and inclusive classroom is highly recommended to support less knowledgeable or less confident teachers in this new endeavor. District staff and principals will need on-going technical assistance from inclusion experts on how to provide for all the students' needs most efficiently, including staff deployment and budgeting for new staffing models.

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[1] E.g. Jay Gottlieb & Susan Polirstaok, A Schoolwide Staff Development Program to Reduce Misbehavior in Inner City Elementary Schools, at 3 (manuscript on file with Advocates for Children).

Consultation Time: Inclusion and team teaching require time for collaborative planning between special and general education teachers, paraprofessionals and service providers, as well as other professional staff.

II. EFFECTIVE PLANNING AND ADEQUATE RESOURCES ARE NECESSARY TO IMPLEMENT THE NEW CONTINUUM EFFECTIVELY

Planning: The Board must engage in proper planning for implementing the new Continuum. As of this report, the Coalition has seen very little in the way of school wide or district wide planning, and little, if any, inter-district planning or procedures implemented to facilitate movement of children back to their neighborhood schools.

Ensure Opportunities for Inclusive Programs in the Early Grades and Continuity from Year to Year: Inclusion should start from preschool or the early elementary grades and continue year after year so a child with disabilities who is progressing well in the general education environment is not shunted into a restrictive setting and back again because of a lack of planning.

The Shortage Of School Personnel Must Be Addressed: Both New York State and New York City must develop mechanisms to address the serious shortages New York City is experiencing of certified teachers (particularly of special education and bilingual special education), principals and other educational service providers, such as speech and occupational therapists.

Resources are Needed for Instructional Materials and Assistive Technology: Instructional materials and assistive technology (such as computers and software, or adaptive devices) that provide access to the general curriculum should be made available to all students receiving special education services in self-contained classes who need them.

III. INFORMED PARENT INVOLVEMENT IS KEY TO THE SUCCESS OF INCLUSION

Parents of children with disabilities must be provided as much information as possible about the new Continuum, the issue of LRE and how to access services for their children, including their rights in the special education process. This information must be provided in languages that the parents can understand.

The whole school community – staff, students, and parents of children both with and without disabilities - should be provided information and training regarding the benefits of LRE and inclusion classes for all children.

IV. MONITORING AND ACCOUNTABILITY OF SCHOOLS AND DISTRICTS ARE VITAL TO ENSURING SUCCESSFUL IMPLEMENTATION OF THE NEW CONTINUUM

Board Oversight: The Board must exercise active oversight to ensure that District Superintendents and Committees on Special Education are committed to implementation

of the new Continuum and are providing recommended programs and services to students in a timely manner.

Disaggregated Data: To promote school district accountability, the State should require the data currently submitted by New York City to be disaggregated and submitted by community school district, roving districts (such as District 75 and District 85) and High Schools by borough, rather than treating New York City as one school district.

Transparent Data: Data collected should be transparent and posted on the Board and NYSED websites and be searchable on-line.

Tracking Movement to the LRE: Reports tracking how many children have moved into less restrictive or more restrictive environments must be followed by rigorous monitoring and analysis, including intra-district analyses of how particular schools are doing.

State and federal monitoring requirements should be consolidated and standardized to eliminate duplicative paperwork.

V. THE QUALITY OF SEGREGATED PROGRAMS MUST BE IMPROVED

Self-contained classes must be improved for those relatively few children who would not academically or socially progress in a general education environment. The general education curriculum must be taught in these segregated classes and programs to the greatest extent appropriate. Expectations for outcomes in all segregated classes should be high but achievable and classes should be evaluated on their success in meeting students' goals.

The State must expand its list of funded private day and residential programs that provide services that unfortunately are not currently available in public schools. Additionally, the process to receive a seat must be streamlined to allow for improved equality.

I. INTRODUCTION

After a long, dismal history of segregating children with special needs, New York City is finally poised to implement a new Continuum of Special Education Services that acknowledges the basic principle that all children have the right to learn together. This initiative has the potential to make real the promise of the federal Individuals with Disabilities Education Act (IDEA)--that children with disabilities will receive an equal opportunity to learn alongside children without disabilities. It also, however, has the potential to perpetuate the second-rate education too many children with disabilities have received for too long, by dumping them in general education without adequately addressing their special needs. This report is intended to help New York City fulfill the promise and avoid potential pitfalls of this admirable initiative.

In the last century, the nation moved from the assumption that people with disabilities should be segregated and could not contribute to society, to the recognition that inclusion, equality, and achievement are the rights of every person with a disability. These ideals were first established in federal law with the Rehabilitation Act of 1973 (P.L. 93-112), which prohibited discrimination against and demanded accommodation of people with disabilities in federally funded programs, and the Education for All Handicapped Children Act (EAHCA), (P.L. 94-142) (re-enacted as the Individuals with Disabilities Education Act (IDEA), which established the entitlement of children with disabilities to a free, appropriate public education in the most inclusive environment appropriate to their needs. Yet over a quarter century later, parents and advocates of children with special needs are still fighting for children's rights to an appropriate education in the least restrictive environment.

In New York City, the majority of children receiving special education spend most of their school day in segregated placements where they are often poorly prepared for educational success and integration into their communities. In these settings, they are typically provided with little access to either the material taught to children in regular education classes or the instructional methodologies necessary to enable them to learn. As a result, educational outcomes for children with disabilities are dismal. Once placed in special education, only a small fraction of students are ever declassified. Teenagers in special education are four times as likely to exit special education by dropping out than by receiving a regular diploma, and are currently more likely to die between the ages of 14 and 21 than to receive a Regents diploma.

Minority children are disproportionately subject to this educational dead end. African American and Latino children continue to be significantly overrepresented in restrictive segregated placements. African American children are almost twice as likely as White students to be educated in restrictive placements. They are almost three times as likely to be recommended for such placements on their initial referral to special education, while Latino students are 2.4 times as likely. English Language Learners are twice as likely as all other children to be referred to special education.

New York City is on the verge of a fundamental restructuring of this system for educating children with disabilities. Last year the New York City Board of Education (the Board) adopted a revised Continuum of Special Education Services (the new Continuum) that affirms the right of every student to be educated in the least restrictive environment (LRE) for that child. For many children, this will be in a classroom with children who do not have disabilities, with appropriate supplementary aids and services, ideally in the child's neighborhood school. But schools must not only bring children into inclusive settings, they must also meet the needs of all children there. Small, well-staffed classrooms, high quality, trained teachers and service providers, parental involvement, and continual oversight and planning are all necessary to achieve this goal. Yet, schools cannot fail to address the needs of students for whom self-contained classrooms are the LRE. They are entitled to access to the general curriculum.

The first of the classes and services restructured under the new Continuum will begin when school starts on September 6, 2001. Students, parents, and schools will need much support to make them work. Advocates across the city have worked for years toward this goal. Many of these advocates have come together over the last two years as the LRE Coalition to make the goals set forth by the new Continuum a reality. With this report from the Coalition, we continue that work by presenting a picture of where we have been and where we are now, as well as providing recommendations for moving toward a better future.

II. WHERE WE HAVE BEEN

A. The Beginnings: From Exclusion to Mobilization

The history of the education of children with disabilities is a history of exclusion and the battle against it. Until well into the 20th century, most children with disabilities were hidden at home or relegated to institutions.[2] For children with cognitive or emotional disabilities, these institutions were more concerned with containment than education. Although schools were established in the nineteenth century for deaf, blind, and orthopedically impaired students, they often offered an inferior level of instruction and did little to prepare students to succeed in a non-segregated world.[3]

In 1910, the White House began a national initiative to promote the education of children with disabilities in local schools.[4] In some states, segregated special education

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[2] Joetta Sack, *Bringing Special Education Students Into the Classroom*, 18 Education Week (January 27, 1999), Education Week on the Web, <http://www.edweek.org/ew/vol-18/20inclus.h18> (accessed August 17, 2001); San Francisco State University, A Chronology Of The Disability Rights Movement (1999) (visited June 12, 2001) <http://www.sfsu.edu/~hrdpu/chron.htm>; Susan Stainback & William Stainback, Inclusion, a Guide for Educators 19, 20 (1996).

[3] Edwin W. Martin et al., *The Legislative and Litigation History of Special Education*, 6 The Future of Children 26 (1996).

[4] Mitchell L. Yell, The Law and Special Education, 56 (1998).

classes were established in public schools for children with some types of disabilities.[5] Still, education was for the lucky and the few. State laws explicitly authorized school districts to exclude children who were considered too disabled to be "educable",[6] or too different to be exposed to the public.[7]

Parents of children with disabilities were the most passionate, constant advocates for their children. They formed organizations to lobby state and federal legislatures and challenge through the courts the exclusion, abuse and discriminatory treatment of their children. Eventually a large national advocacy movement developed from these small local groups.[8]

The racial civil rights movement helped the public to understand that segregating and excluding people with disabilities is discrimination. The 1954 Supreme Court ruling in *Brown v. Board of Education of Topeka*[9] gave legal support for the fight for quality education for children with disabilities. Stating that education was "perhaps the most important function of state and local governments," *Brown* established that separate schools for Blacks and Whites were inherently unequal and violated the equal protection guarantee of the Fourteenth Amendment of the United States Constitution. Following *Brown*, federal courts relied upon the Fourteenth Amendment to create some measure of inclusion and appropriate treatment for people with disabilities.[10]

In the early to mid 70's parents and advocacy groups across the country filed legal challenges to exclusionary educational practices. Two cases were particularly influential:

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[5] William Stainback & Susan Stainback, *Contemplating Inclusive Education from a Historical Perspective*, in, Creating an Inclusive School, 32 (Richard A. Villa & Jacqueline S. Thousand, eds., 1995). The first special class for students with disabilities in a public school in New York was opened in 1899 in Manhattan for children with physical disabilities. William Jansen, The First Fifty Years: A Brief Review of Progress 1898-1948; The 50th Annual Report of the Superintendent of Schools, 33 (1949).

[6] As discussed further below, New York, along with numerous other states permitted school districts to refuse to educate students considered "uneducable" because of mental retardation, behavior problems, or other disabilities. *See* S. REP., No. 94-168, at 6 (1975) (discussing legal challenges to exclusionary rules and laws in 29 states pending at the time of the enactment of the EAHCA). As late as 1969, the State of North Carolina made it a crime for parents to persist in trying to enroll a child with disabilities in public school after the child's exclusion. Yell, *supra* note 5 at 55.

[7] *See e.g.*, Beattie v. Board of Education of the City of Antigo 169 Wis. 231, 172 N.W. 153 (Wis. 1919) (ruling that a child with physical disabilities could be excluded from his local school and forced to enter a school for the deaf on the grounds that his disability was offensive to his classmates and teachers).

[8] Yell, *supra* note 5, at 56-59.

[9] 347 U.S. 483 (1954).

[10] Pennsylvania Ass'n for Retarded Citizens v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1972); Mills v. Board of Education of the District of Columbia, 348 F. Supp. 866 (D.D.C. 1972).

Pennsylvania Assn. for Retarded Children v. Pennsylvania[11] (*PARC*), and *Mills v. Board of Education of District of Columbia*[12] (*Mills*).

PARC invalidated a Pennsylvania law that denied any public education to mentally retarded children who had not reached the "mental age of five." Holding that the claim that these children could not benefit from an education was erroneous, the court ordered Pennsylvania to provide to each child between the ages of 6 and 21 a "free program of public education appropriate to his needs." Inclusion was an explicit part of the holding: the court ordered that in meeting this obligation, "placement in a regular school class is preferable to placement in a special public school class and placement in a special public school class is preferable to placement in any other type of program of education and training."

The second case, *Mills*, was brought on behalf of poor, Black children labeled with having behavioral problems, emotional disabilities, mental retardation, or hyperactivity who had been excluded from school and an appropriate education. In a situation disturbingly familiar to advocates in New York City today, one of the plaintiffs was excluded because he was hyperactive and "wandered around the classroom." The court ordered the district to give parents of children with disabilities the opportunity for a due process hearing *before* changing the placement, transferring, or removing children with disabilities from their classrooms, and held that the public school systems had a constitutional obligation to provide an adequate education to all of their children. Cases like these helped to convey the need for a fundamental change in the way the nation's school districts were educating their children. These orders became a blueprint for the Education of All Handicapped Children Act.

B. Section 504 and the Education of All Handicapped Children Act

In the 1970s, Congress enacted two historic statutes that, between them, radically changed the legal landscape for people with disabilities, the Rehabilitation Act of 1973 (P.L. 93-112),[13] hereinafter referred to as Section 504 (the section dealing with education),[14] and the Education for All Handicapped Children Act (EAHCA) P.L. 94-142, later renamed the Individuals with Disabilities Education Act (IDEA).[15] The Education of the Handicapped Act (EHA), P.L. 91-230, passed in 1970, consolidated federal funding streams for individuals with disabilities under a single law, but did not directly address discrimination.[16]

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[11] 334 F. Supp. 1257 (E.D. Pa. 1971).

[12] 348 F. Supp. 866 (D.D.C. 1972).

[13] 29 U.S.C. § 700 et seq.

[14] 29 U.S.C. § 794.

[15] 20 U.S.C. § 1400 et. seq.

[16] To Assure the Free Appropriate Public Education of Children with Disabilities: The Twenty-Second Annual Report to Congress on the Implementation of the Individuals with Disabilities Act,("22nd Annual Report to Congress"), IV, U.S. Dep't. of Educ. (2000).

Section 504 was the first national civil rights statute for people with disabilities. Applying to all entities that receive federal funding, including public schools, it prohibits deliberate exclusion and recognizes that for people with disabilities, treatment identical to that given people without disabilities can also be discrimination. It therefore requires covered organizations to provide reasonable accommodations to ensure that people with disabilities are not excluded from the benefits of federally funded programs. The law opened doors to education, employment, transportation, and a wide variety of community agencies and programs that had been firmly shut against people with disabilities.

This general prohibition, however, was not enough to address widespread exclusion from appropriate education. With little funding and few specific requirements, the law had no teeth. Congressional hearings in the Section 504's aftermath disclosed that more than half of the Nation's children with disabilities were still not receiving appropriate educational services, that one out of every eight children was wholly excluded from the public school system, and that many others were simply "warehoused" in regular or special classes until they were old enough to drop out.[17]

To address these problems, Congress passed the EAHCA in 1975, a revolutionary statement about the way children with disabilities should be educated. The new law mandated that states afford a "free appropriate public education" to *all* children with disabilities between the ages of 5 and 21, regardless of the severity of their disability. It required that this education be devised by a team of experts, teachers, and parents, and be individually tailored to meet the child's specific educational needs. Parents were given special procedural rights to provide them the power to make decisions and advocate for their children's education, including, as ordered in Mills, the right to a hearing to challenge the decisions of the school system and the right to have their children remain in their current educational setting pending the hearing.

The EAHCA also included a promise of significant federal funding—up to 40% of the average cost of educating a child in public schools in the United States.[18] Congress has never provided more than a small fraction of this amount.[19]

Because the EAHCA was passed in large part to address exclusion and segregation of children with disabilities, the need to integrate children with disabilities in

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[17] 20 U.S.C. § 1400(b)(3) & (4); H. R. Rep. No. 94-332, at 2 (1975); Honig v. Doe, 484 U.S. 305 (1988) (discussing legislative history). Congress found that emotionally disturbed children were among the worst served: for the school year immediately preceding passage of the Act, the educational needs of 82 percent of all children with emotional disabilities went unmet. *See* S. Rep. No. 94-168, p. 8 (1975) (hereinafter S. Rep.).

[18] 20 U.S.C. § 1411(a)(2).

[19] The current funding level is only about twelve percent. Erik W. Robelen, *Senate Backs Full Funding of Special Ed.* Education Week, May 9, 2001.

regular environments was at the very heart of the law. In the words of one of the original drafters, "We are concerned that children with handicapping conditions be educated in the most normal possible and least restrictive setting, for how else will they adapt to the world beyond the educational environment, and how else will the nonhandicapped adapt to them?"[20]

Today, the IDEA reflects this original purpose and mandates that,

> to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled and . . . removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.[21]

As numerous courts have held, the IDEA creates a presumption that all children may be educated in integrated settings if appropriate supports and services are provided. Districts may not overcome this presumption without first taking appropriate steps to try to include the disabled child.[22]

The statute specifically did not require leaving children in regular classes without appropriate support—indeed, this was one of the problems Congress sought to address. Rather, as repeatedly held by state and federal courts, it was an "express mandate" to provide all necessary supplemental aids and services to ensure that children can receive an effective and individualized education in the least restrictive environment.[23]

C. Amendments and Judicial Construction

Since 1975, Congress has amended the EAHCA several times, each time to strengthen and build upon its original vision. In 1986, the law was amended to offer states grants to provide appropriate education for preschool children aged 3-5 and early intervention to infants and toddlers under 3 years old.[24] In 1990, the EAHCA was

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[20] 120 Cong. Rec. 58438, 1974 (remarks of Sen. Stafford).

[21] 20 U.S.C. § 1412(a)(5)(A).

[22] *See, e.g.*, Oberti v. Board of Educ., 995 F.2d 1204, 1214 (3d Cir. 1993); Daniel R.R. v. Board of Educ., 874 F.2d 1036, 1044 (5th Cir. 1989); A.W. v. Northwest R-1 School Dist., 813 F.2d 158, 162 (8th Cir. 1987); Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir.) *cert. denied*, 464 U.S. 864 (1983); Mavis v. Sobol, 839 F. Supp. 968 (N.D.N.Y. 1993); Board. of Educ. v. Holland, 786 F. Supp. 874, 878 (E.D. Cal. 1992).

[23] Daniel R.R. v. Board of Educ., 874 F.2d at 1048; *see also*, Oberti v. Board of Educ., 995 F.2d at 1214; Roncker v. Walter, 700 F.2d at 1063; Board of Educ. v. Holland, 786 F. Supp. at 878; Mavis v. Sobol, 839 F. Supp. at 989.

[24] P.L. 99-457.

renamed the Individuals with Disabilities in Education Act, and "transition services" were added to ensure that education systems prepared disabled students to move into productive, independent lives after graduation.[25] Also in 1990, Congress acted to expand protections for people with disabilities by passing the Americans with Disabilities Act (ADA), P.L. 101-336. The ADA extended Section 504's prohibition of discrimination by organizations receiving federal funding, to prohibit discrimination by any entity, public or private (including private schools), offering employment or services.

Judicial decisions have helped to define the legal contours of the IDEA. Some of the pivotal Supreme Court decisions are as follows:

- *Hendrick Hudson Sch. Dist. v. Rowley* (1982): A "free appropriate public education" is not the best possible education, but one that complies with the procedural requirements of the Act and is "reasonably calculated to provide educational benefit."[26]
- *School Committee of the Town of Burlington v. Mass. Dept. of Educ.* (1985); *Florence County School Dist. v. Carter* (1993): Educational agencies must reimburse parents who enroll their children in private schools if the agency failed to offer the child a free appropriate public education.[27]
- *Honig v. Doe* (1988): Educational agencies may not remove disabled students for disciplinary reasons for more than ten days without determining whether their behavior was related to their disabilities and without providing due process and the right to "stay put" during any challenges to such removals.[28]

These decisions, however, posed as many problems as they solved. The low bar set by the "reasonably calculated to provide educational benefit" standard made it difficult for parents to demand that public school systems provide their children with effective educational methodologies. In combination with the right to demand reimbursement for private school placements, this led wealthier or more sophisticated parents who might otherwise have fought to demand reform of public special education to leave the public system, leaving poorer children condemned to schools that had no incentive to provide the most up-to-date research-based educational methodologies. Furthermore, while the decision regulating suspension of children with behavior problems should have forced school systems to address those problems effectively in the classroom, it instead led them to force more children into ever more restrictive settings.

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[25] P.L. 101-476.

[26] Board of Educ. v. Rowley, 488 U.S. 176 (1982).

[27] Parents could be reimbursed for enrollment in State-approved private schools. School Committee v. Department of Educ., 471 U.S. 359 (1985). The Court extended this right to parents who enrolled their children in non-approved schools in School Dist. v. Carter, 510 U.S. 7 (1993).

[28] Honig v. Doe, 484 U.S. 305 (1988).

Currently, children throughout the nation labeled emotionally disturbed are twice as likely as other children to be educated in segregated settings.[29]

By the mid-1990s, Congress acknowledged that although children with disabilities were mostly identified as disabled and receiving some kind of education, "the promise of the law [had] not been fulfilled for too many students with disabilities."[30] While most children now had access to school, the education they received there was damned by low expectations, a focus on paperwork over substance, and refusal to implement the best research-based educational methodologies.[31] Because the federal government has never fully funded the IDEA, currently providing only a third of full funding, states have used lack of resources as an excuse for not providing an effective education.[32] In short, for children with disabilities, particularly poor and minority children, special education was often not a package of services that enabled them to learn, but a place where they were put, in many cases until they dropped out of school.[33]

With the 1997 reauthorization of the IDEA, Congress sought to ensure that the promise of the law could be fulfilled. The IDEA reaffirms and strengthens the commitment to an appropriate, individualized education in the least restrictive environment. The IDEA now includes multiple requirements to ensure that children with disabilities can progress in the "general curriculum" taught to all students.[34] It requires that states become more accountable for the performance of children with disabilities by including them in statewide and local educational assessments and publishing their progress towards improving assessment results, graduation rates, and dropout rates.[35] It emphasizes the need for "high-quality, intensive professional development"[36] for people working with children with disabilities, having high expectations for all students, strengthening the role of parents and families in the education of their children, and increasing the focus on applying replicable research on teaching and learning for children with disabilities.[37] The law also provides greater recognition of the problems of children with behavioral problems, requiring districts to address behavioral problems with positive

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[29] The 22nd Annual Report to Congress.

[30] *See* H.R. Rep. No. 105-95 at 89.

[31] *See* H.R. Rep. No. 105-95 at 84-85.

[32] Robelen, *supra* note 20.

[33] *See* 20 U.S.C. § 1400(c)(8).

[34] 20 U.S.C. §§ 1412(a)(16)-(17), 1414(d)(1) & (4).

[35] 20 U.S.C. § 1412(a)(16) & (17).

[36] 20 U.S.C. § 1400(c)(5)(E).

[37] 20 U.S.C. § 1400(c)(4) & (5).

behavioral interventions[38] and strengthening the rights of students removed for disciplinary reasons.[39] It also requires states to ensure that their funding formulas do not encourage placement of children in excessively restrictive environments.[40] The IDEA is intended to make sure that children with disabilities are not only allowed through the school house doors, but that they also receive a meaningful education once they get there.

D. New York City History

New York City has the same history of segregation and exclusion of children with disabilities as the rest of the nation, but compounded by the challenges of running one of the biggest, most diverse, educational systems in the country. The result has been a school system that is particularly poor at including children with disabilities, and one that has relegated minority children to a segregated and substandard education.

Although New York State has had schools for the children with hearing and vision impairments since 1865,[41] these early schools were wholly segregated. Students labeled "mentally defective" or "physically handicapped" were often not sent to schools at all, but were committed, even against the will of their parents, to institutions.[42] Although in 1917 New York passed laws requiring special education classes for certain disabled students, these laws applied only to children that districts felt could be made "economically and socially competent."[43] Similarly, in 1947, New York State passed a compulsory education law, but it excluded any child "whose mental or physical condition is such that his attendance upon instruction . . . would endanger the health or safety of himself or of others, or who was feeble-minded to the extent that he is unable to benefit from instruction."[44]

Until the 1970s, exclusion from regular classrooms was part of the definition of a child with disabilities. Under a previous version of the New York Education Law, a "handicapped child" was "one who, because of mental, physical or emotional reasons, cannot be educated in regular classes . . ."[45] The only kind of education the law required

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[38] 20 U.S.C. § 1414(d)(3)(B)(1).

[39] 20 U.S.C. §§ 1412(a)(5) & 1415(k).

[40] 20 U.S.C. § 1412(a)(5)(B).

[41] Matter of Levy, 382 N.Y.S.2d 13, 659 (1976).

[42] In re Jackson, 293 N.Y.S.19 (Dom. Ct. 1937).

[43] Elgin v. Silver, 15 Misc. 2d 864, 182 N.Y.S.2d 669 (Sup. Ct. 1958).

[44] Former N.Y. Educ. Law § 3208 (McKinney 1981); *quoted in* Michael A. Rebell, *Jose P. v. Ambach: Special Education Reform in New York City*, included in Barbara Flicker, ed., Justice And School Systems: The Role Of The Courts In Education Litigation, 29, 30 (1990).

[45] N.Y. Educ. Law § 4401 (McKinney's Consol. Laws, c. 16, 1970).

was segregated education: school districts were directed "to furnish suitable education facilities for handicapped children by means of home-teaching, transportation to school, or by special class."[46]

Many children with disabilities were excluded from education altogether. Through the 1950s, for example, laws requiring classes for mentally retarded students up to age 21 covered only students with Intelligence Quotients over 50.[47] New York City also refused to educate cognitively impaired students over 17, even if they met this criterion, if the Board felt they were not "expected to profit from special educational facilities."[48]

The education of children with emotional or behavioral problems was equally lacking. Until 1967, long after state laws required some measure of education for other children with disabilities, emotionally disturbed children had no entitlement to educational services.[49] Although since 1946, New York City had educated emotionally disturbed and behavior disordered students in so-called "600" schools, these schools were as much containment facilities for troublesome students as legitimate educational institutions.[50] With an almost wholly Black and Latino enrollment, these schools were criticized, studied, protested, boycotted and finally sued for racial discrimination, failing to provide an appropriate education, and serving as dumping grounds for children that teachers did not want in their classrooms.[51]

Even children without emotional or cognitive problems were typically excluded. Judith Heumann, who later became a teacher and national leader serving as Assistant Secretary of Education under President Clinton, was turned away from her Brooklyn elementary school in kindergarten. The school claimed that because she used a wheelchair, fire codes did not allow her to attend. She remained at home with a few hours of tutoring a week for years. For children with disabilities, as she described it, "If you were lucky, you were getting a little home instruction."[52]

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[46] N.Y. Educ. Law § 4404(2) (McKinney's Consol. Laws, c. 16, 1970).

[47] Elgin v. Silver, 15 Misc. 2d 864, 182 N.Y.S.2d 669 (Sup. Ct. 1958).

[48] *Id.*

[49] Matter of the Appeal of Jack J. Goldmacher, 2 Ed. Law. Rep. 304, 305, N.Y. Ed. Comm'r Dec. No. 7101 (1962).

[50] Lora v. Board of Educ., 456 F. Supp. 1211, 1219-20 (E.D.N.Y. 1978).

[51] *Id.*

[52] Joetta Sack, *Bringing Special Education Students Into the Classroom*, Education Week, 4, Jan. 27, 1999 (visited July 19, 2001) <http://www.edweek.org/ew/vol-18/20inclus.h18>; *see also* Deanna L. Sands et al., Inclusive Education for the 21st Century, p. 3 (2000).

In 1959, New York City had only 8 special education classes; by 1970, there were still only 184, schooling 1089 children.[53] These classes wholly failed to meet the needs of the thousands of disabled students in New York City. As late as 1973, the City maintained a "Medical Discharge Register," listing students that were indefinitely excluded from school because of their disabilities.[54] Many students were never even evaluated, or languished in home instruction for lack of appropriate placement.[55] Others were condemned to wholly separate institutions that provided inadequate, and sometimes horrific, treatment and education.

The 1970s saw a sea change in the education of children with disabilities in New York City. In 1972, the parents of residents at the Willow Brook State School in Staten Island, New York, an institution for individuals labeled mentally retarded, filed suit challenging its appalling conditions.[56] Television broadcasts of the inhumane conditions at the facility outraged the public. This press exposure, together with the lawsuit and other advocacy, eventually moved thousands of people from the institution into community-based living arrangements.[57]

In 1975, parents of minority children at the infamous "600 schools" for students labeled "socially maladjusted and emotionally disturbed" filed a lawsuit challenging discriminatory placement and improper treatment at these schools.[58] During the course of the lawsuit, the defendants made many changes to the schools and ultimately agreed to a program of nondiscriminatory standards and procedures, as well as independent monitoring at the schools.[59]

Parents also brought several systemic challenges to special education in New York City.[60] In 1973, the Commissioner of Education ordered the city to remedy delays

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[53] Matter of Reid v. Board Of Educ., 453 F.2d 238, 241 (2d Cir. 1971).

[54] Matter of Reid, 13 Ed. L. Rep. 117, 118, N.Y. Ed. Comm'r Dec. No. 8742 (1973).

[55] *Id.*

[56] *See* New York State Ass'n. for Retarded Children v. Carey, 706 F.2d 956 (2d Cir. 1983) (summarizing history of case).

[57] San Francisco State University, A Chronology Of The Disability Rights Movement (1999) (visited August 15, 2001) <http://www.sfsu.edu/~hrdpu/chron.htm>.

[58] Lora v. Board of Educ., 456 F. Supp. 1211 (E.D.N.Y. 1978), *vacated and remanded* 623 F.2d 248 (2d Cir. 1980) *on remand,* 587 F. Supp. 1572 (E.D.N.Y. 1984).

[59] Lora v. Board of Educ., 587 F. Supp. 1572 (E.D.N.Y. 1984).

[60] Matter of Reid v. Board Of Educ., 453 F.2d 238, 241 (2d Cir. 1971); Matter of Reid, 13 Ed. L. Rep. 117, 118, N.Y. Ed. Comm'r Dec. No. 8742 (1973); Matter of Michael A., 16 Ed. L. Rep. 18, N.Y.Ed. Comm'r Dec. No. 9282 (1976); Matter of Kelly, 15 Ed. L. Rep. 427, N.Y.Ed. Comm'r Dec. No. 9234 (1976) (challenging New York City Board's inadequate procedures and placements for children with disabilties).

in evaluation and placement of children with disabilities in *Matter of Reid*.[61] However even after New York State amended its education laws to conform to the Education for All Handicapped Children Act in 1976, these problems worsened.[62] After a second order by the Commissioner in 1977 failed to address the delays, in 1979 the *Reid* plaintiffs filed the class action *Jose P. v. Ambach* in federal court in Brooklyn.[63] Shortly thereafter two more class actions were filed raising both delays in evaluation and placement and additional issues. *United Cerebral Palsy (UCP) v. Board of Education* [64] raised the lack of adequate procedures to ensure an appropriate and inclusive education and the lack of physically accessible facilities for mobility-impaired students. *Dyrcia S., et al. v. Board of Education*[65] focused on the particular problems of Spanish-speaking students. Ultimately all three cases were consolidated and are known as *Jose P.*.

Judge Eugene Nickerson appointed retired federal judge Marvin E. Frankel as Special Master to "make recommendations as he deems appropriate as to what decree the Court should enter to provide the requisite public education to handicapped children in the City of New York."[66] This began the massive review and revision of New York City's special education delivery system that continues to this day.

III. JOSE P.

In 1979, Judge Nickerson approved a judgment in the *Jose P. v. Ambach* case that contained provisions relating to a wide variety of issues concerning the timely and appropriate evaluation and placement of all children with disabilities in the New York City public schools. In addition to directing the Board of Education to comply with relevant federal and state laws, the judgment directed the Board of Education to (1) engage in a multi-part planning process for the implementation of a new special education services delivery system, (2) develop a set of operating procedures by which Board of Education staff should undertake the evaluation and service delivery process, (3) increase resources to facilitate timely evaluation and placement, including hiring staff, purchasing office equipment, creating office space and providing instructional materials for classrooms, (4) develop informational materials for parents to inform them of their rights, and (5) reduce physical barriers that kept children with mobility impairments from participating in programs. These are just a few of the issues addressed through *Jose P.* Over the past twenty years, the judgment has been expanded to include numerous other issues, including remedies for parents whose rights are violated.

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[61] *Id.*

[62] Matter of Reid, (Reid II) 17 Ed. L. Rep. 71, 75-76, N.Y. Ed. Comm'r Dec. No. 9499 (1977).

[63] No. 79 Civ. 270.

[64] No. 79 Civ. 560.

[65] No. 79 Civ. 270.

[66] EHLR 551:245, 247 (E.D.N.Y. 1979).

The role that *Jose P.* played in the development of LRE policy in New York City is interesting. When the case was filed, the focus was the Board's failure to provide any services at all to thousands of children and not on LRE specifically. The judgment mandated that children be given a free appropriate education in the LRE and ordered the creation of a new continuum of services. The judgment also required that related services be provided to the children found to need them and that each school have a resource room. But the judgment's provisions on achieving LRE placements remained general.

Over the years, however, LRE became an increasingly central issue in *Jose P.* Counsel for *Jose P.* plaintiffs pushed the Board to develop its LRE Initiative and participated on the Board's LRE Initiative Committee. Counsel pressed the Board to develop a new continuum focusing on services in the LRE. They monitored the implementation of consultant teacher services, which allowed children to receive special education teacher support without leaving their general education classrooms. They pushed for increases in the number of related services providers, particularly bilingual ones. Currently, *Jose P.* counsel are actively monitoring the Board's implementation of the new continuum.

IV. WHERE WE ARE NOW

Today, New York City still lags behind both the state and the nation by placing a majority of its special education students in segregated settings. While the City is making some progress towards including more students in less restrictive environments, educational outcomes for children with disabilities are bad and getting worse—more students are dropping out and even fewer are receiving diplomas. Despite much attention to racial and ethnic disparity in special education over the last decade, minority students and English Language Learners continue to be significantly overrepresented in certain classifications and in restrictive settings, with few signs of improvement. New York has much to achieve before it can offer children with disabilities the inclusive and quality education they deserve.

A. Placement in the Least Restrictive Environment

In the 2000-01 school year, more than half (54%) of school aged special education students in New York City spent more than 60% of their time in a self-contained class in a general education school or separate facility for children with disabilities. One in eleven students (8.8%) were in wholly separate facilities; only 45.3% spent 20% or less of their time outside of a general education classroom.[67]

While these figures are worse than average for New York State, they are even further behind the national average. In 1997-98, children in New York City were 31% more likely than the average child in New York State to be in a segregated setting most of the day, and 2.36 times more likely than the average child in the United States: while

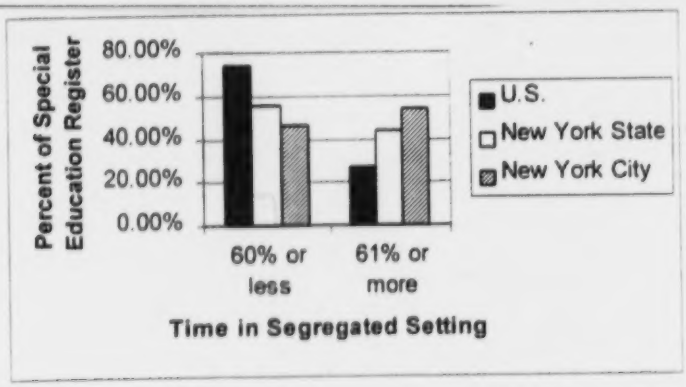
[67] New York City Board of Education PD-4 Report, at 18 (2000).

nationally, only 24.54% of children with disabilities spent more than 60% of the day in a segregated setting, 57.84% of children in New York City did.

Table 1: Comparison of National, State, and New York City By Time Spent in Restrictive Settings by Children 6-21 Receiving Special Education (1997-98)[68]

Time Out of Integrated Environment	U.S.	NYS	NYC
20% or less	46.43%	43.16%	41.94%
21-60%	29.04%	12.92%	.22%
60% or less	**75.46%**	**56.08%**	**42.16%**
More than 60%in regular school	20.40%	34.86%	48.36%
Separate setting	4.14%	9.06%	9.48%
More than 60% or separate setting	**24.54%**	**44.02%**	**57.84%**

Table 2: Graph Comparing U.S., NYS, & NYC by Setting (1997-98)



Much of this difference seems to be the result of differences in the rate at which New York City and New York State educate children with and without disabilities together for only part of the day—while 29.04% of students nationally were in integrated settings between 21% and 60% of the day, and 12.92% of students across New York State were, **only .22%** of students in New York City were in such placements. In other words, the vast majority of children in New York City are either in a regular class almost full time, or a special class almost full time, without much in between.

In recent years, the statistics have demonstrated a small degree of progress towards placement in the LRE, both in New York State and New York City.[69] Data from the 1999-00 school year show that for the first time in many years, the special education classification rate in New York State did not increase, but rather remained the same as it

[68] To Assure the Free Appropriate Public Education of Children with Disabilities, Twenty Second Annual Report to Congress on the Implementation of the Individuals with Disabilities in Education Act, Table AB2, A-97-98, U.S. Dep't. of Educ. (2000) (hereinafter "Twenty Second Annual Report to Congress"), and New York City Public Schools PD-4 Form at 15 (1998).

[69] Memorandum from Lawrence C. Gloeckler to the Members of the New York State Board of Regents, Updated Special Education Data, March 30, 2001.

was in the previous year – 11.8%.[70] The State's percentage of school-aged students with disabilities who are in general education classes for at least 80% of the school day caught up to the previous year's national rate, 47.6%, as compared to the 1998-99 national average of 47.4%.[71] The percentages of school-age students served in separate special schools decreased from 8.9% in 1998-99 to 8.5% in 1999-00; the number of school districts placing more than 15% of students with disabilities in separate education settings continued its three-year decline, from 59 in 1997-98 to 47 in 1998-99 to 36 in 1999-00. The school age declassification rate has, however, decreased, declining from 5.8% to 3.4% between the 1995-96 and 1999-00 school years.[72]

The state has made significant progress in inclusion of preschool age students, in part due to *Ray M. v. New York State Department of Education*[73], which was settled in 1999 and requires the city and state to place preschool children in the LRE. The State percentage of preschool students served in integrated settings increased substantially, to 55.5% in 1999-00 from 32.3% in the 1995-96 school year. The State's preschool declassification rate has increased, from 10% in 1995-96 to 16% in 1999-00.

New York City has shown slower progress towards placement in the LRE, with a 3.4 point increase in the percentage of students educated in a segregated setting 20% or less of the day, a 3.1 point drop in the percentage of students being educated in a self-contained classroom in a regular school, and a .7 point drop in the percentage of students educated in a separate setting over the last three years. The promise of the new Continuum is to radically accelerate this progress.

Table 3: Chart of Percentage of NYC Students (Age 4-21) Receiving Special Education in Placements of Ascending Restrictiveness, from 1997 to 2000[74]

Outside Reg.Class	12/1/97	12/1/98	12/1/99	12/1/00
20% or less	41.94%	43.96%	44.72%	45.34%
21-60%	0.22%	0.25%	0.35%	0.73%
Over 60%	48.36%	46.56%	46.32%	45.15%
Separate	9.48%	9.23%	8.66%	8.77%

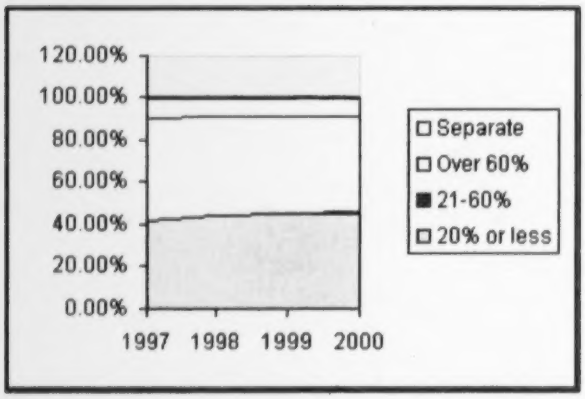
[70] The University of the State of New York, New York, the State of Learning: Statewide Profile of the Educational System, Table 2.4 (Albany: New York State Education Department), July 2000.

[71] Memorandum from Lawrence C. Gloeckler to the Members of the New York State Board of Regents, Updated Special Education Data, March 30, 2001.

[72] *Id.*

[73] Ray M. v. Board of Educ., et al., 94 Civ. 1103 (EHN).

[74] New York City Board of Education PD-4 Reports (1997-2001).



B. New York City's Rate of Classification in Special Education

New York City's rate of initial referral of general education students for special education evaluation is significantly lower than other big cities in New York State. In 1998-99, the City classified 11% of its students as needing special education, while the "Big Four" city school districts--Rochester, Buffalo, Syracuse and Albany--together classified 14.6%.[75] The classification rate of the State as a whole was 11.8%, with the lowest rates shown in the "low need" districts – 10.7%.[76] As New York City's population of children with special needs is far more likely to resemble that of the Big Four as opposed to that of the low need districts, it has been suggested that New York City actually under-refers to special education and is failing to reach and support many of its children.[77]

C. Educational Outcomes

While New York City has made some progress towards educating children in the LRE, exit data reveal no progress in improving outcomes for children classified as needing special education. In fact, outcomes have become worse.

Once referred, a child is likely to be placed in special education, and once in special education is unlikely to leave it.[78] In 1999-00, New York City declassified fewer

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[75] New York State Department of Education, Chapter 405 of the Laws of 1999 Report , Part 1 chart B (2000).

[76] *Id.*

[77] John Farago, *Introduction*, Education Law Institute 2001: Current and Emerging Issues in Special Education, 21 (John Farago & Paul Ivers, eds., Practicing Law Institute 2001) (noting that "High Need" districts tended to have classification rates for school-age children up to twice as high as "Average or Low Need" districts).

[78] Jay Gottlieb & Mark Alter, An Analysis of Referrals, Placement, and Progress of Children with Disabilities Who Attend New York City Public Schools, Final Report, (New York: New York University), U.S. Department of Educ., Educational Resources Information Center, document # ED 414372 (1994).

school-aged special education students (2.1%) and fewer preschool special education students (11%) than any other district in the state, regardless of need category.[79] If special education really were what it is supposed to be—specialized instruction individualized to help children meet their goals—failure to leave special education would not be a concern. However outcomes for children in special education are bleak. In New York City, children go in to special education, but they don't come out—at least not with the credentials they need to succeed in the adult world.

The Board of Education report on outcomes for high school students[80] shows that among students in general education settings (including both regular education and special education students), 49.9% had graduated after four years, while only 1.7% of students in District 75[81] programs and only 7.4% of students in high school based self-contained classes had done so. In other words, students in self-contained classes were seven times less likely to graduate in four years, and students in District 75 programs were twenty-nine times less likely to do so.

Dropout rates also appear to be much higher for special education students. Although the Board of Education does not collect exactly comparable data for general education and special education students,[82] a comparison of existing data shows that the "event-drop out rate"—the percentage of all students enrolled dropping out in any one year—was 48% higher for special education students than it was for general education students.[83] When one considers the number of students dropping out within four years as compared to the total of students exiting, the Board's data shows that drop out rates are three times higher for students in District 75 classes than for those in general education, as well as nearly three times higher for students in self-contained classes. (Table 5). Dropout rates, moreover, are increasing for all students, rising from 15.6% in 1998 to 19.3% in 2000, the highest point jump in the last eight years.[84] Drop out rates for

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[79] Memorandum from Lawrence C. Gloeckler to the Members of the New York State Board of Regents, Updated Special Education Data, March 30, 2001.

[80] The Class of 2000: Four-Year Longitudinal Report and 1999-2000 Event Drop-out Rates, 21, 23 (hereinafter "Class of 2000 Longitudinal Report").

[81] District 75 is a citywide district serving the most severely disabled students, primarily in self-contained classrooms.

[82] The Board of Education does not report year by year exit data for special education students, but instead primarily reports on the percentage of students entering high school that have dropped out after four years. *See* The Class of 2000 Longitudinal Report. Because 60-80% of students in special education settings are still enrolled after four years, while only 30% of general education students are still enrolled, these figures cannot be used to accurately compare outcomes for special education and general education students.

[83] This figure was calculated by comparing the event drop out rates in the Class of 2000 Longitudinal Report with the percentage of special education students between ages 14 and 21 that dropped out between 1999 and 2000 as reported by the PD-4s.

[84] Class of 2000 Longitudinal Report at 15.

students in self-contained classes are increasing even faster, rising 3.5 percentage points compared to the 1.8 point increase for all students.[85]

Table 4: Outcomes for General Education, Self-Contained Class, and District 75 Students Exiting After Four Years[86]

	General Education	Self Contained Class	District 75
Percent Dropping Out (% of Total Exiting)	19.3 (27.89%)	27.9 (79.04%)	17.5 (91.15%)
Percent Graduating (% of Total Exiting)	49.9 (72.11%)	7.4 (20.96%)	1.7 (8.85%)
Percent Exiting After Four Years	69.2	35.3	19.2

Educational outcomes for special education students in New York City are also far worse than those for special education students in New York State and across the nation. Among students between 14 and 21 exiting the special education system, students in New York City are less than half as likely as students nationwide to receive a regular high school diploma, and about half as likely as students statewide. They were 91% more likely than students nationwide to exit by dropping out, and 62% more likely than the average student in New York State.

Table 5: Comparison of Educational Outcomes (1997-98): United States, New York State, and New York City[87]

	U.S.	NYS	NYC
Dropped out	82,709 (24.6%)	7,537 (29.09%)	4,234 (47.04%)
Regular Diploma	147,942 (44.00%)	9,400 (36.28%)	1,601 (17.79%)
Total exiting*	336,201	25,910	9173

*Other than by moving.

In 1999-00, special education students ages 14-21 were four times more likely to exit special education by dropping out than by receiving a regular high school[88] or high school equivalency diploma. They were approximately one and a half times as likely to exit by dropping out as by receiving any kind of diploma, including an IEP diploma or local certificate, both of which only signify that the student has achieved his or her IEP goals. Only 51 students, less than 0.1% of the 9,173 high school age special education students leaving the school system in 1999-00 received Regents diplomas.[89]

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[85] Class of 2000 Longitudinal Report at 21-23.

[86] Class of 2000 Longitudinal Report at 21 & 23.

[87] 22nd Annual Report to Congress, A-221-22; 1997-98 New York City PD-5 Report at 14. Students who moved to a different school district are not included in these numbers or those in the tables below. Because the U.S. Department of Education counts students that exit by receiving a GED diploma as dropouts, percentages for New York are slightly different than those in the table below.

[88] By "regular high school diploma" we mean a Regents' or local diploma, as opposed to an IEP diploma, local certificate or GED.

[89] 1999-00 New York City PD-5 Report at 15.

Educational outcomes are not improving, but have gotten worse over the last three years. The percentage of students exiting special education with either a regular diploma or an IEP diploma or certificate has decreased steadily. The percentage of students exiting by dropping out increased by almost ten percentage points between the 1997-98 and 1998-99 school years, and went down only one half of a percentage point the following year. While there was a slight increase in the percentage of students being decertified, and 15 additional students with disabilities received Regents diplomas, the increase in dropout rates and the decrease in the rate at which students with disabilities earned any kind of diploma overshadow these improvements.

Table 6: Outcomes for Students Aged 14-21 Exiting Special Education in New York City 1997-98 through 1999-00[90]

	Regents Diploma	Local or Equivalency Diploma	IEP/Local Certificate	Decertified	Reached Max. Age	Died	Dropped Out	Total
1997-98	31 (.0034%)	1,750 (19.44%)	1,913 (21.25%)	1,048 (11.64%)	169 (1.87%)	36 (.0039%)	4,054 (45.03%)	9,001
1998-99	36 (.0034%)	1,560 (14.72%)	1,955 (18.44%)	1,000 (9.43%)	275 (2.59%)	42 (.0039%)	5,729 (54.06%)	10,597
1999-00	51 (.0055%)	1,239 (13.51%)	1,669 (18.19%)	1,004 (10.95%)	244 (2.66%)	55 (.0059%)	4,911 (53.54%)	9,173

The Board of Education has suggested that the increase in the drop out rate may be attributable to the new movement to retain students and deny them diplomas if they do not meet certain standards.[91] Starting in the fall of 1998, the Board of Education began to implement new promotional and graduation standards, retaining students who have not accumulated a certain number of credits, and requiring students to pass Regents exams in order to graduate.[92] Students in segregated classrooms rarely study the general education curriculum necessary to prepare for the Regents tests. Knowing that receiving a diploma is unlikely, many may choose to simply drop out. Because of a "safety net" creating a longer phase-in period for special education students, only the promotional requirements, and not the graduation requirements, should have impacted special education students at this stage. If this is the impact of retention alone, the impact of the new graduation standards will be disastrous.

While the educational outcomes for children in segregated settings are worse than for those in inclusive settings, the poor educational outcomes for children in special education in general shows that placement in less restrictive environments is only part of

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[90] 1997-98 New York City PD-5 Report at 14; 1998-99 New York City PD-5 Report at 15; 1999-00 New York City PD-5 Report at 15.

[91] The New York City Board of Education. *Flash Research Report # 5*, An Examination of the Relationship Between Higher Standards and Students Dropping Out, March 1, 2001 (visited June 21, 2001) <http://www.nycenet.edu/daa/reports/index.html>.

[92] New York State Education Commissioner's Regulations, Part 100.

the solution. New York City must do much to improve not only where students are educated, but also how they are educated, to ensure that children with disabilities have a chance to succeed in school and later life.

V. OVERREPRESENTATION OF MINORITIES IN SPECIAL EDUCATION AND IN THE MOST RESTRICTIVE PLACEMENTS

Immigrants and racial minorities have always been overrepresented in special education, both in New York and the country as a whole. When the City first started using test results to divide students into ability groups in the 1920s, up to 40% of the children of European immigrants were labeled "educationally retarded."[93] Since at least the 1960s, the City has been the subject of public complaints and legal actions for disproportionately classifying Black and Latino students and segregating them in restrictive special education classrooms and facilities. While there are limited signs of improvement, the system still is, as a 1993 study by Advocates for Children of New York described it, "segregated and second-rate."[94]

In the mid-1990s, the United States Department of Education's Office of Civil Rights (OCR) investigated New York for overrepresentation of English Language Learners and minorities in special education referral, certification and placement in restrictive environments. In 1997, the Board of Education entered into a Memorandum of Understanding (MOU) with OCR to address the problems of overrepresentation of certain groups and failure to place students in the LRE. Pursuant to this MOU, for the past three years the Board has analyzed and reported disparity in referral, certification and restrictive placement for ELLs and ethnic minorities. Although community school districts with significant overrepresentation are supposedly then identified for follow-up, interviews for a report by Sinergia, Inc. reveal that school district personnel were unaware that they were so identified, and/or did not know of the corrective plans that should have been created as a result.[95]

In 1999, New York State enacted "Chapter 405,"[96] requiring the State Department of Education (NYSED) to identify school districts with high rates of identification, low rates of declassification, high rates of placement in separate sites and significant racial and ethnic disparity in identification and placement in particular settings of students with

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[93] Diane Ravitch, The Great School Wars, 231, 310-11(1974).

[94] Advocates for Children of New York, Inc., Segregated And Second Rate: "Special" Education In New York (New York), 1993. In 1991-92 African-American students were overrepresented in more restrictive placements statewide, constituting 19.8% of the general education population but 34.1% of segregated placements. Latinos comprised 15.1% of the general education population but 23% of segregated placements. In contrast, White students made up 59.8% of general education placements but only 41.3% of segregated placements.

[95] The Metropolitan Parent Center of Sinergia, Inc., Race, Language and Special Education in New York City, 2-3 (2000) ("Sinergia Report").

[96] New York Education Law § 4403(21) & (22).

disabilities. NYSED was then required to work with the identified school districts to verify such rates, determine underlying causes and, if necessary, require the development of a corrective action plan.

Last spring, NYSED notified New York City's Schools Chancellor that the City had been cited pursuant to Chapter 405 as having statistics showing that "something other than chance" may be causing disproportionate representation of ethnic and racial minorities in these areas:

- identification of school-age students as having a disability or in the identification of students by particular disabilities;
- placement of preschool students with disabilities in separate settings; and
- placement of school-age students with disabilities in more restrictive settings.[97]

Of particular concern was the disproportionate referral rate of English Language Learners (ELLs) to special education. In 1999-00, ELLs were more than twice as likely as other students to be referred to special education: 7.2% of ELLs were referred to special education, as against only 3.2% of non-ELLs.[98]

A. Disproportionate Referral and Classification

In 2000, the Metropolitan Parent Center of Sinergia, Inc. published Race, Language and Special Education in New York City (the Sinergia Report), its analysis of initial referrals to special education between the 1996-97 and 1998-99 school years. The report found that while referral rates had decreased for all races, they had decreased most slowly for Black students, so that Black students, who had been 30% more likely than other students to be referred for special education, were 40% more likely to be so referred in 1997-98.[99] English Language Learners also continued to be significantly over-represented, with a referral rate of 8.17%, more than twice the 3.85% rate for non-English Language Learners.[100] There continued to be tremendous variation between districts in rates of overrepresentation, and district personnel did not appear to be aware of district corrective plans.[101] New York University Professors Jay Gottlieb and Mark Alter, in a 1994 study commissioned by the New York City Board of Education, blamed this

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[97] Letter from Rita D. Levay of the NYSED Office of Vocational and Educational Services for Individuals with Disabilities to New York City Education Chancellor Harold O. Levy (April 2001).

[98] Updated Performance Indicators Profiles N.Y.C. Bd. of Educ. (visited July 12, 2001) <http://www.nycenet.edu/daa/reports/index.html>.

[99] Sinergia Report at 1.

[100] Sinergia Report at 43.

[101] Id. at 2-3.

discrepancy in part on the lack of standardized educational criteria for making referrals to special education or eligibility for placement in special education.[102]

Statistics for the 2000-01 school year reveal little improvement in overrepresentation over the last 10 years.[103] A 1990 report by the Board reveals that at that time, Black students were 38% of the general education register, but 41% of the special education register, with a 7.8% overrepresentation rate.[104] In 2000-01, the situation was even worse: Black students composed 38.38% of the special education population, and 34% of the general education population, with a 12% overrepresentation rate. Hispanic students, who were underrepresented by 2.9% in 1990, were overrepresented by 6.6% in 2000, composing 38.9% of the general education population, but 41.5% of the special education population.[105] The only good news is that White students, who were slightly underrepresented, are now represented in the special education population about equally with their representation in the general population, and underrepresentation of combined Asian, American Indian and Alaskan Native students, while still very significant, has decreased, these students were 7% of the general register and 2% of the special education register in 1990, and are now 11.5% of the general register and 4.8% of the special education register.

There are even more significant discrepancies in the rates at which students are classified as having particular disabilities. The label given a child has a significant impact on the expectations for the child, the kind of education the child receives, and the setting in which the child is educated. After taking into account their overrepresentation in the special education population as a whole, Black students are 40% more likely than White students to be classified as mentally retarded. Hispanic students are 25% more likely than other students to be classified as speech/language impaired, suggesting that evaluators are reacting to English ability rather than disability.[106] White students, on the other hand, are more than three times more likely than Black or Hispanic students to be classified as other health impaired.[107]

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[102] Gottlieb & Alter, *supra* note 76.

[103] Anecdotally speaking, for years advocates have experienced parents stating explicitly that they think their child is being identified or placed in a certain way because of race.

[104] Special Education Students in New York City Public Schools, A Racial Ethnic Distribution (1990).

[105] Analysis in the Sinergia Report suggests that non-ELL Hispanic students continue to be somewhat underrepresented in special education referrals. Sinergia Report at 42. This overrepresentation, therefore, is entirely due to the gross overrepresentation of ELLs in special education.

[106] While there are possible reasons for the disproportion other than this one, the overrepresentation of Hispanics in the category of speech/language impaired is suggestive and worthy of examination.

[107] While Asian students are overrepresented among mentally retarded and speech/language impaired students, their rate of underrepresentation among special education students as a whole makes it difficult to ascribe meaning to this overrepresentation.

Table 7: Special Education Students by Classification and Race (2000-01)[108]

Disability Category	Combined—Asian/Other	Black-not Hispanic	Hispanic	White (not Hispanic)	Total
Autistic	273 **(9.26%)** (3.74% of Asian/other)	1174 **(39.84%)** (2.05% of Black students)	848 **(28.78%)** (1.37% of Hispanic students)	652 **(22.12%)** (2.86% of White students)	2,947 (1.97%)
Emotionally Disturbed	514 **(2.62%)** (7.05% of Asian/Other)	10,394 **(52.99%)** (18.11% of Black students)	6,442 **(32.84%)** (10.38% of Hispanic students)	2266 **(11.55%)** (9.94% of White students)	19,616 (13.12%)
Learning Disabled	3,373 **(4.35%)** (46.27% of Asian/other)	29,639 **(38.20%)** (51.64% of Black students)	33,102 **(42.66%)** 53.35% of Hispanic Students	11,477 **(14.79%)** (50.34% of White students)	77,591 (51.89%)
Mentally Retarded	388 **(5.74%)** (5.32% of Asian/other)	2,954 **(43.69%)** (5.15% of Black special education students)	2,478 **(36.65%)** (3.99% of Hispanic students)	942 **(13.93%)** (4.13% of White students)	6,762 (4.52%)
Speech Impaired	1807 **(5.90%)** (24.79% of Asian/other)	9,326 **(30.46%)** (16.25% of Black Students)	14,914 **(48.70%)** (24.04% of Hispanic Students)	4,575 **(14.94%)** (20.07% of White students)	30,622 (20.48%)
Other Health Impaired	168 **(6.31%)** (2.30% of Asian/Other)	741 **(27.82)** (1.29% of Black students)	748 **(28.08%)** (1.21% of Hispanic Students)	1,007 **(37.80%)** (4.42% of White students)	2,664 (1.78%)
Total	7290 **(4.8%)**	57,392 **(38.38%)**	62,046 **(41.50%)**	22,797 **(15.25%)**	149,525
General Ed. Register[109]	11.5%	34.2%	38.9%	15.3%	

Perhaps most significant is the overrepresentation of Black students among those classified as emotionally disturbed. Black students are twice as likely as White students to be classified as having an emotional disability, making up 52.98% of all students so classified.[110]

Among the thirteen disabling classifications, emotional disturbance is perhaps the most prone to subjective decision-making. A Board of Education school psychologist, asked in an administrative hearing to testify as to whether emotional disturbance was a "medical classification" responded this way: "No, it does not exist outside of the Board

[108] 2000-01 New York City PD-4 Report at 19.

[109] From School Reports Cards, Board of Education Division of Assessment and Accountability (visited August 2, 2001)< http://www.nycenet.edu/daa>

[110] Nationally and citywide, students classified as emotionally disturbed have some of the worst educational outcomes and the poorest rates of integration.

Table 8: Setting and Educational Outcomes for Students Classified Emotionally Disturbed: U.S., State, and City Comparison (taken from 22nd Annual Report to Congress, A-105, A-229-30; 1997-98 New York City PD-4 Report at 8; 1997-98 New York City PD-5 Report at 2.)

		US	NYS	NYC
Time in segregated setting	60% or less	48.27%	24.04%	**12.48%**
	More than 60%	51.73%	75.97%	**87.52%**
Educational Outcome	Regular Diploma	31.38%	25.50%	**10.93%**
	IEP diploma/certificate	4.88%	9.62%	**12.02%**
	Dropped Out	42.70%	45.53%	**63.27%**

of Education. It is just a classification that the Board of Ed uses to explain children that are having significant behavioral issues which impact their functioning."[111] With such arbitrary criteria, students so classified often have a variety of other disabilities, including cognitive, speech, and learning disabilities, that remain undiagnosed and untreated, and which are overshadowed by the child's poor behavior in school which becomes the focus of the services offered.

The impact of behavior on student referrals goes beyond students classified as emotionally disturbed. Nationally, according to an expert on referrals to special education, "[s]tudies show teachers refer kids who bother them, and we've been able to demonstrate that specifically African American males demonstrate behavior that bothers teachers."[112] In New York, almost half of all referrals involve the behavior of the students referred; teachers realize that they cannot refer all students that need academic help, and therefore "often use misbehavior as the primary filter for making a referral."[113] The result is that students who exhibit behavior teachers cannot cope with are over-referred, while educational disabilities of students who do not exhibit such behaviors are not addressed.

B. Disproportionate Placement in Restrictive Environments

Even more striking than disproportionate classification are discrepancies in what happens to students once they are referred to special education. The Sinergia Report found that while only 12% of White students were recommended for a self-contained class on initial referrals, 35% of Black students and 29% of Hispanic students were recommended for such placements. In other words, Black students were three times as likely to be recommended for a segregated setting, and Hispanic students were 2.4 times as likely.[114]

These statistics are reflected in the racial composition of segregated placements. In 2000-01, among students in special education, Black students were 85% more likely than White students to be placed in a self-contained class in a public school; Hispanic students were 73% more likely.[115] White students were 49% more likely than Black students to be in a regular class for 20% or more of the day, and 29% more likely than Hispanic students. White students, however, were far more likely to attend private special education schools (at public expense). White students were 3.4 times more likely

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[111] Transcript of Impartial Hearing on November 9, 2000 in Case No. 41197, at 24.

[112] Dorothy Lipsky & Alan Gartner, Inclusion, Educational Restructuring, and the Remaking of American Society, 66 Harv. Educ. Rev. 762, 765 (1996) (quoting James Ysseldyke).

[113] Jay Gottlieb & Susan Polirstaok, A Schoolwide Staff Development Program to Reduce Misbehavior in Inner City Elementary Schools, at 3 (manuscript on file with Advocates for Children).

[114] Sinergia Report at 43.

[115] 2000-01 New York City PD-4 Report at 18.

to attend these schools than Black students, and 4.6 times more likely to attend such schools than Hispanic students.

Table 9: Educational Setting and Race (2000-01)[116]

Time out of Integrated Setting	Asian/Other	Black (Not Hispanic)	Hispanic	White (not Hispanic)	Total
20% or less	3712 (5.47%)	22605 (33.34%)	28127 (41.48%)	13358 (19.70%)	67802 (45.34%)
21% to 60%	95 (8.68%)	373 (34.06%)	337 (30.78%)	290 (26.48%)	1095 (.73%)
60% or more in regular school	2813 (4.17%)	29055 (43.04%)	29410 (43.56%)	6234 (9.23%)	67512 (45.15%)
Separate Public School	418 (4.94%)	2930 (34.6)	3920 (46.29%)	1200 (14.17%)	8468 (5.66%)
Special Private Day School	188 (5.93%)	750 (23.67%)	947 (29.89%)	1283 (40.5%)	3168 (2.12%)
Public residential Facility	8 (4.97%)	57 (35.40%)	80 (49.69)	16 (9.94%)	161 (.11%)
Private Residential Facility	12 (3.15%)	99 (25.98%)	119 (31.23%)	151 (39.63%)	381 (.25%)
Home, Hospital or other non-school setting	44 (4.69%)	336 (35.82%)	293 (31.24%)	265 (28.25%)	938 (.63%)
Total in All Settings	7290 (4.88%)	56,205 (37.59%)	63,223 (42.29%)	22797 (15.25%)	149,525

Table 10: Proportion of Students by Race in Particular Settings, 2000-01

Time out of Integrated Setting	Percentage of Asian /Other students	Percentage of Black students	Percentage of Hispanic students	Percentage of White students	Total in setting
20% or less	50.92%	40.22%	44.48%	58.60%	45.34%
21% to 60%	1.30%	.66%	.53%	1.27%	.73%
60% or more in regular school	38.59%	51.69%	46.51%	27.35%	45.15%
Separate Public School	5.73%	5.21%	6.20%	5.26%	5.66%
Special Private Day School	2.58%	1.33%	1.50%	5.63%	2.12%
Public residential Facility	.11%	.10%	.13%	.07%	.11%
Private Residential Facility	.16%	.18%	.19%	.66%	.25%
Home, hospital, other non-school setting	.60%	.60%	.46%	1.16%	.63%
Total in All Settings	7,290	56,205	63,233	22,797	149,525

Together, the statistics show that race and language continue to be very significant factors in a child's experience with the special education system. The overrepresentation of Black children among those classified in general, among those classified as emotionally disturbed, and among those sent to segregated settings, shows a desperate need to develop more effective ways of responding to challenging behaviors in

[116] *Id.*

the classroom, and raises a red flag as to why this group is overrepresented in this area. The underrepresentation of Asian students, moreover, and the lower rate of classification of students in New York City, suggests that the Board of Education may be failing to evaluate or serve these students in its efforts to bring classification rates down. The continued gross overrepresentation of English Language Learners also indicates that New York City must do more, both to appropriately educate English Language Learners so that they do not fall behind, and to ensure that its evaluation tools do not inappropriately diagnose as disability what is simply a difficulty with language. Finally, the overrepresentation of White students among those placed in private settings suggests that districts should not, in their efforts to ensure that students are included in inclusive settings, deprive minority students of equal access to this important alternative.

VI. THE LEAST RESTRICTIVE ENVIRONMENT MANDATE

A. Benefits of Education in the Least Restrictive Environment

Inclusionary education is not just the law; it is also good educational policy. The benefits of LRE can be great, resulting in increased motivation, higher self-esteem, improved communication and socialization skills, and greater academic achievement for students both with and without disabilities.[117] Classrooms that reflect the larger world offer better preparation for post-secondary employment and community life.[118] Research demonstrates that a well-designed and supported class including students with and without disabilities ("an inclusion class") provides the best learning environment for most children with special needs.[119] But it also teaches that effective inclusion involves more than just placing the child in the classroom. Special education means specialized instruction, and requires a well-designed curriculum and the use of effective instructional models, without which the benefits of inclusion may not be fully realized.

Expectations for children with disabilities are often lower in segregated settings, and these children are often assumed to be unable to master the material presented to other children. As a result, special education students do not have access to the curriculum presented in inclusive settings. This disparity is particularly troubling in light

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[117] For summaries of the research, *see* Caroline Moore & Debra Gilbreath, Educating Students With Disabilities In General Education Classrooms: A Summary Of The Research, Western Regional Resource Center, University of Oregon (1998) (visited June 21, 2001) <http://interact.uoregon.edu/wrrc/AKInclusion.html> (hereinafter "A Summary of the Research"); and The United States Department of Education, 21st Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, III-21-27, April, 2000 (visited June 22, 2001) <http://www.ed.gov/offices/OSERS/OSEP/OSEP99AnlRpt/> (hereinafter "21st Report to Congress").

[118] Since the purpose of education is to teach for the student's lifetime, the positive results of inclusion in school will affect the future of our community.

[119] *See* The 21st Report to Congress at III-20 (citing parent reports that their children were learning material from the general education curriculum as a result of their inclusive placement).

of the movement to retain students or deny them regular high school diplomas if they do not meet standardized criteria – the very standardized criteria that they are often denied in segregated settings.

Students with disabilities therefore typically do better academically in inclusive settings. Three "meta-analyses" (studies of all the studies) have found that "special-needs students educated in regular classes do better academically and socially than comparable students in noninclusive settings."[120] In one Montana school district, for example, almost all students with mild disabilities made progress in inclusion classes, while some students made phenomenal two to three year gains.[121] While not all students do better academically, recent surveys of the literature show that they do no worse in inclusive settings.[122]

Studies show almost universally that children with disabilities who are placed in inclusive settings gain more in social and communicative skills than children in segregated settings.[123] Children learn how to communicate and act from each other as much or more than they do from adults, so that peer role models are invaluable teachers in this area. A multi-year study of students with severe disabilities in 43 classrooms, for

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[120] Edward T. Baker et al., *The Effects of Inclusion on Learning*, 52(4) Educational Leadership, 152 (1994); *see* Mary S. Fishbaugh & Patricia Gum, *Inclusive Education In Billings, Montana: A Prototype For Rural Schools* (1994), ERIC Reproduction Service, No. ED 369636; Nancy L. Waldron & James McLeskey, *The Effects of an Inclusive School Program on Students with Mild and Severe Learning Disabilities*, 64 Exceptional Children 395-405 (1998). There are program models in which substantial benefits were found. *See e.g.* Margaret C. Wang & Jack W. Birch, *Comparison of a Full-Time Mainstreaming Program and a Resource Room Approach*, 51 Exceptional Children 33-40 (1984); P. Hunt et al., *Evaluating the Effects of Placement of Students with Severe Disabilities in General Education versus Special Classes*, 19 Journal of the Association for Persons with Severe Handicaps 3, 200-214 (1994) (noting that students with severe disabilities in inclusion classes made much greater progress than those in segregated classes). There are also models in which some, but not all, curriculum areas were positively affected. *See e.g.*, James Q. Affleck, et al., *Integrated Classroom Versus Resource Model: Academic Viability and Effectiveness*, 54 Exceptional Children 4, 339-348, (1988). There are also models that are effective for some, but not all, students. *See, e.g.*, Genevieve Manset, & Merlin I. Semmel, *Are Inclusive Programs for Students with Mild Disabilities Effective? A Comparative Review of Model Programs*, 31 The Journal of Special Education 2, 155-180 (1997).

[121] Summary of the Research at 6.

[122] Dorothy Lipsky & Alan Gartner, National study o inclusion, Overview and summary report, National Center on Educational Restructuring and Inclusion Bulletin, 2 (2) (1995).

[123] *See e.g.* Sarup R. Mathur & Robert B. Rutherford, Jr., *Peer-Mediated Interventions Promoting Social Skills Of Children And Youth With Behavioral Disorders*, 14 Education and Treatment of Children, 3, 227-242 (1991) ; *see also* T. Bennett et al., *Putting Inclusion Into Practice: Perspective Of Teachers And Parents*, 64 Exceptional Children 1, 115-131 (1997) (noting that parents report that inclusion classes increase their children's social and communication skills); and Michael J. Guralnick, et al., *Parent Perspectives Of Peer Relationships And Friendships In Integrated And Specialized Programs*, 99 American Journal on Mental Retardation, 457-476 (1995.

example, found that students in integrated settings made significant progress in social communicative abilities, while the students in the segregated settings regressed.[124]

Participation in inclusive educational classes also results in friendships between children with and without disabilities,[125] especially when students attend schools close to home.[126] Care must be taken, however, since teaching staff that cling to the disabled child and do not interact with or help other children stigmatize the child and prevent relationships from forming.[127] In addition, students who are "mainstreamed" (brought in for limited classes) tend to be perceived as outsiders and do not form relationships with the receiving class unless school staff take steps to ensure they are included as full members of the class.[128]

Inclusive settings also benefit students without disabilities. Because even a general education classroom includes many students with diverse learning styles, whole group instruction is increasingly viewed as a barrier to learning for all students.[129] The instructional practices used in inclusive classes, including collaborative small group learning, effective management techniques, and presenting information in a variety of ways, benefit all students.[130]

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[124] David A. Cole & Luanna H. Meyer, *Social Integration and Severe Disabilities: A Longitudinal Analysis of Child Outcomes*, 25 Journal of Special Education 3, 340-51 (1991).

[125] D. Fryxell & C.H. Kennedy (1995). *Placement Along The Continuum Of Services And Its Impact On Students' Social Relationships*, 20 Journal of the Association for Persons with Severe Handicaps 259-269; C.H. Kennedy et al., *Comparing the Effects of Educational placement on the Social Relationships of intermediate School Students with Severe Disabilities*, 64 Exceptional Children 1, 31-48 (1997).

[126] John McDonnell et al., *Variables Associated with In-school and After-school Integration of Secondary Students with Severe Disabilities*, 26 Education and Training in Mental Retardation 243-257 (1991).

[127] 21st Report to Congress at III-23 (where adults maintained constant physical proximity to students with disabilities they inhibited interactions with peers; if the adults formed good relationships with non-identified students, interaction with students with disabilities was increased).

[128] Id. at III-23-24; *see e.g.*, Dianne Ferguson et al., *Figuring Out What to Do with the Grownups: How Teachers Make Inclusion 'Work' for Students with Disabilities*, 17 Journal of the Association for Persons with Severe Handicaps 218 (1992) (describing how a student was included in drama class).

[129] Id. at III-20-21.

[130] *See e.g.*, Marvin Lew et al., *Components Of Cooperative Learning: Effects Of Collaborative Skills And Academic Group Contingencies On Achievement And Mainstreaming*, 11 Contemporary Educational Psychology, 229-239 (1986); Larry Maheady et al., *Classwide Student Tutoring Teams: Effects on the Academic Performance of Secondary Students*, 21 Journal of Special Education, 3, 102-21 (1987); Robert E. Slavin, Cooperative Learning: Theory, Research and Practice (2nd ed., Allyn & Bacon, 1995). For examples of teaching strategies for inclusion classroom, *see* Sylvia McNamara & Gill Moreton, Teaching Special Needs: Strategies and Activities for Children in the Primary Classroom, (David Fulton Publishers, 1993).

Studies show significant academic gains for both at-risk and regularly progressing students without disabilities in inclusive classrooms.[131] Research also shows that students with disabilities do not detract from the academic engagement of the class, and that children without disabilities do not model inappropriate behaviors by peers with disabilities.[132] Indeed, a 1997 survey of the literature regarding academic achievement in inclusive settings concluded that "gains for students *without* disabilities [were] the most consistent outcome of this body of research."[133]

Students without disabilities also get significant social benefits from inclusion. Teachers report that accommodation of students without disabilities in general education classes naturally gives rise to conversations about fairness and equity that enhance the values and social skills of all students.[134] The opportunity for students with different abilities to help each other develops cooperation and self-esteem. Students without disabilities in inclusive classrooms develop improved attitudes towards those with different abilities,[135] which stay with them for years after leaving the inclusion class.

The relatively few studies that found poor results for students in inclusive classrooms mostly involved students placed in general education classrooms without proper supports[136] or special education services.[137] These studies provide further

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[131] 21st Report to Congress at III-25; Richard A. Villa and Jacqueline S. Thousand, *The Rationales for Creating Inclusive Schools*, included in Creating an Inclusive School, 32, ASCD, Alexandria (R.A. Villa & J.S. Thousand, eds., 1995). *See also* Lisa Saint-Laurent et al., *Academic Achievement Effects of an In-Class Service Model on Students With and Without Disabilities*, 64 Exceptional Children 2, 239-253, 1998 (reporting significant gains in writing scores by at-risk students and in reading and math scores by general education students over control group).

[132] Samuel L. Odom et al., *Integrating Handicapped and Nonhandicapped Preschoolers; Developmental Impact on Nonhandicapped Children*, 51 Exceptional Children 1, 41-48 (1984).

[133] 21st Report to Congress at III-20 and 25, *citing* Genvieve Manset & Merlin I. Semmel, *Are Inclusive Programs for Students with Mild Disabilities Effective? A Comparative Review of Model Programs*, 31 The Journal of Special Education 2, 155-187 (1997). For example, a Canadian study comparing a pull-out resource room model to an inclusion model found that non-identified students made significant gains in writing, reading, and math scores, while identified students performed the same in the inclusion and pull out classrooms. Lise Saint-Laurent et al., *Academic Achievement Effects of an In-Class Service Model on Students With and Without Disabilities*, 64 Exceptional Children 2, 239-253 (1998).

[134] I.M. Evans, *Children's Perception Of Fairness In Classroom And Interpersonal Situations Involving Peers With Severe Disabilities*, 19 Journal of the Association for Persons with Severe Handicaps 326-332 (1994).

[135] 21st Report to Congress at III-25: E. Helmstetter et al., *Outcomes Of Interactions With Peers With Moderate Or Severe Disabilities: A Statewide Survey Of High School Students*, 19 The Journal of the Association for Persons with Severe Handicaps 4, 263-276 (1994).

[136] Lawrence Baines et al., *One School's Reality*, 76 Phi Delta Kappan 1, 39 (1994).

[137] Naomi Zigmond & Janice M. Baker, *Concluding Comments: Current and Future Practices in Inclusive Schooling*, 29 The Journal of Special Education 2, 245-250, (1995).

confirmation that the many benefits of inclusion classes may not be realized without prepared teachers, adequate supports, and effective instructional techniques. "Dumping"—putting children with special needs into the general education class without adequate supports—is not productive.[138]

Over twenty years of research shows that inclusion, when done properly, will result in an enriching and educationally superior experience for all children. It also shows, however, that inclusion is not just about setting. Returning students with disabilities to general education classrooms must be part of a school-wide reform to support all children.[139] The curriculum must be presented in different ways for different learners, be made available in materials accessible to all students, and allow for different levels of complexity for students of varying abilities.[140] Teachers must be provided with small class sizes as well as sufficient support staff and training to provide all students with the education that they need. The new Continuum has the promise of providing tremendous benefit to all children, but our schools must have the support necessary to ensure that this promise is achieved.

B. New York's Response to the LRE Mandate

Prior to the entry of the *Jose P.* decree in 1979, virtually all of New York City's special education population was educated in self-contained classrooms.[141] *Jose P.* resulted in a great deal more resources being applied to referral, evaluation, and provision of services to children with disabilities. Yet, New York State and City were still unable or unwilling to fulfill the federal requirement that children be educated in the least restrictive environment. A number of factors have been identified as contributing to this failure, including the State's funding formula for special education and, in New York City, the ineffective structure of special education administration and the lack of resources in the general education setting.

1. State Funding Formula

The way New York State provides funding for special education has slowed progress towards the LRE. New York State provides more funding to school districts for children who are classified as needing special education, and, until the year 2000, provided almost twice as much extra funding for children educated in more restrictive

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[138] Arthur H. Shapiro, Everybody Belongs: Changing Negative Attitudes Toward Classmates with Disabilities, 27 (1999).

[139] *See* Naomi Zigmond & Janice M. Baker, *Mainstreaming Experiences for Learning Disabled students (Project MELD): Preliminary Report*, 57 Exceptional Children 2, 176-185 (1990).

[140] R. Orkwis, *Curriculum Access and Universal Design For Learning*, ERIC/OSEP Digest # E586, ERIC Reproduction Service No.: ED437767 (1999).

[141] Michael Rebell, *Jose P. v. Ambach, Special Education Reform in New York City*, fn 133, in Justice and School Systems: The Role of the Courts in Education Litigation (Barbara Flicker, ed., Temple University Press, 1990).

settings as it did for classified children educated in less restrictive settings.[142] Probably few IEP teams took this funding bias directly into account in placing individual children, but it surely discouraged school districts from putting time and money into creating effective inclusive settings and impacted IEP teams' perceptions of what settings were available. In 1997, the U.S. Department of Education Office of Civil Rights charged that the state's funding formula was partly responsible for New York's high numbers of segregated placements and noted the disproportionate segregation of Black and Hispanic students with disabilities.[143]

The funding formula also violated the 1997 IDEA. The IDEA requires that if funding is distributed according to the setting in which a child is educated, the state must ensure that the formula does not result in violation of the LRE requirement.[144] For three years the United States Department of Education's Office of Special Education and Rehabilitation Services (OSERS) granted New York State waivers of this requirement with the understanding that New York would revise its funding formula. In 1999, however, OSERS refused to grant another waiver, and withheld $335 million in federal funds from the state. This coupled with the support of the New York State Education Department and advocacy from organizations that support the educational rights of children with disabilities forced the legislature to finally change the formula.

School districts will now receive significant extra funding for each special education child that receives special education support services for at least 60% of the day in an integrated setting.[145] While districts will still receive additional funds for students receiving special services for most of the day in a segregated setting, they will receive even more if those students receive services in a class with general education students.[146] Because of widespread confusion, implementation of the formula, which was slated to begin in 1999, has been rolled back until the 2001-02 school year.

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[142] "Excess cost aid" (additional state dollars to school districts) for students with disabilities is calculated by multiplying the "weight" a child is given by a certain dollar amount. Under the old formula, children receiving special education services in a special class or segregated setting more than 60% of the day received a weight of 1.7. Children spending twenty percent or more of the day receiving special services, such as resource room or consultant teacher, received a weight of only 0.9. Children receiving such services less than twenty percent of the day received a weight of only 0.13. N.Y. Educ. Law § 3602(19) (West Supp. 1999) (amended by L. 1999, ch. 405, pt. L, § 104(16)).

[143] Memorandum of Understanding between the New York City Board of Education and the U.S. Department of Education, Office of Civil Rights, p. 4 (1997) (hereinafter "the MOU").

[144] 20 U.S.C. § 1412(a)(5)(B); 34 C.F.R. § 300.130; *see* Corey H. v. Board of Educ., 27 IDELR 713 (N.D. Ill. 1998) (finding Chicago Board of Education liable for funding formula violating LRE).

[145] N.Y. Educ. Law § 3602(19)(b-1) (1999).

[146] Under the new formula, in the first year a district would still receive a 1.7 weighting for a child if the child received special education services--in whatever setting--for 60% or more of the school day. If those services were provided in a class with non-disabled students, however, the child would receive an additional .5 weighting, resulting in a total weighting of 2.2. Under the new formula the weighting for children receiving special education services 60% or more of the time will also decrease slightly over the next three years, from 1.7 in the years 1999-2000 and 2000-2001, to 1.68 in 2001-2002, to 1.65 in the year

The formula still largely provides funding based on setting, rather than services, violating the spirit and perhaps the letter of the IDEA. It still fails to provide funding for preventive services, perhaps encouraging unnecessary classification of at-risk students. The formula also fails to provide any extra funding for students who can be integrated for less than 60% of the time. But it is a step forward, and, if New York City's new Continuum is any evidence, the promise of extra dollars is already encouraging creation of inclusive special education placements. The ultimate effect of the formula remains to be seen since implementation is just beginning.

2. General Education Resources

The lack of adequate services or support in general education is also a fundamental reason for New York City's high classification rates and failure to provide classified students a quality education in an inclusive environment. With inadequate funding, overcrowded classrooms and poorly prepared, overburdened teachers, restrictive placements are often an easy way to dispose of students that take up scarce time and resources.

In 1985, a task force appointed by then-Mayor Ed Koch warned that the problems of the special education system could be traced in part to the problems of the general education system: "Unless and until regular education provides needed supplemental services to teachers and children who are not now receiving them, Special Education will continue to function as an extremely expensive, and potentially harmful, safety valve for the school system."[147]

Much of this is the result of the historic under-funding of the New York City education system. In 1998, a commission appointed by Mayor Rudolph Guiliani repeated the finding of the Koch task force, tracing the ballooning restrictive special education placements to the early 1970s, when "New York City's fiscal crisis stripped support services such as guidance, counseling, speech therapy, and remedial reading programs from general education. As a result, Board of Education staff was increasingly forced to rely on Special Education as the only available means of meeting students' special needs, a practice and perception which exists to this day."[148]

2002-2003. The funding formula is immensely complicated, but is well explained in State Formula Aids and Entitlements for Schools in New York State (As Amended by Chapters of the Laws of 2000), New York State Education Department, State Aid Division (August 2000) (visited June 25, 2001) <http://stateaid.nysed.gov/hndbk00.pdf>.

[147] The Final Report to Mayor Edward I. Koch of the Commission on Special Education ("the Beattie Commission"), Special Education: A Call for Quality 13 (1985).

[148] Mayor's Task Force on Special Education, Reforming Special Education in New York City: An Action Plan, 7 (1998).

The failure to provide an appropriate education for all students amounts to a constitutional violation.[149] On January 9, 2001, after six years of litigation in the *Campaign for Fiscal Equity v. New York State* (*CFE*), Judge Leland Degrasse issued a 116 page decision holding that "the education provided New York City students is so deficient that it falls below the constitutional floor set by the Education Article of the New York State Constitution."[150] The court held that one cause of this deficiency was New York State's failure, over the course of many years, to provide enough funding to provide a sound basic education to New York City's students.[151] The court also held that this failure had an unjustified disparate impact on minority students.[152]

The decision describes in detail the ways that the education provided New York City school children is inadequate, and poorer than the education received by students across the state, and the relationship to inadequate funding. The court concluded, for example, "there are too many ill-trained and inexperienced teachers to meet the difficult challenges present in the New York City public schools."[153] Over the last ten years, according to the evidence presented at trial, between 11.4 and 13.3% of regular education teachers in the New York City school were uncertified, and 25% of District 75 teachers were.[154] Among NYC teachers, 31.1%, 27%, and 25.7% failed respectively, the Liberal Arts and Science Test, the Elementary Assessment of Teacher Skills, and the Secondary Assessment of Teacher Skills, compared to only 4.7%, 3%, and 3.5% of teachers across the state.[155] The court attributed these and other deficits in the quality of NYC teachers in part to the fact that teachers in New York were paid between 20% and 36% less than teachers in the surrounding suburbs.[156] The court also stated that, "the professional development currently provided to New York City public school teachers is inadequate."[157]

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[149] Moreover, it robs society of a significant percentage of its citizens' productivity. Underfunding education therefore ends up being a very expensive public policy.

[150] Campaign for Fiscal Equity v. State of New York, 182 Misc. 2d 1, 4, 719 N.Y.S.2d 475 (2001).

[151] 182 Misc. 2d at 113. State funding is part, but is not the only cause of the failure to provide them. Full federal funding under the IDEA and more and better allocation of funding within New York City would also go far to help. Governor Pataki has chosen not to respond to the CFE decision by revising the unconstitutional funding formula, but instead to appeal it. In the meantime, he has refused to substantially increase state education funding.

[152] *Id.*

[153] 182 Misc. 2d at 25.

[154] *Id.* at 26-27.

[155] *Id.* at 28.

[156] *Id.* at 33-34.

[157] 182 Misc. 2d at 31.

In enacting the 1988 New York School Construction Act[158] the State Legislature found that,

> the elementary and secondary schools of the City of New York are in deplorable physical condition. Many of the schools are overcrowded, unsafe, unhealthy and unusable. The physical deterioration of the schools is a serious impediment to learning and teaching. If the quality of education in New York City is to be improved, the city's schools must be modernized, expanded and restored to a state of good repair.

In the *CFE* decision, the court reiterated this finding, concluding in addition that "[t]he poor physical state of New York City public school facilities coupled with an influx of new students into the system in the late 1980s and the first half of the 1990s has resulted in severe overcrowding in many of its schools."[159] The court found that, in part as a result of this, "New York City's class sizes have been consistently higher than the State average" and significantly higher than the maximum number that could still receive benefits of small class sizes.[160] The court also noted that many other resources were historically inadequate, including textbooks, library books, classroom supplies, and modern technology.[161]

All of these deficits encourage teachers to seek classification of students with different abilities and discourage them from including special education students. A 1999 study of in-service teachers' attitudes toward inclusion identified the primary barriers to inclusion as the time constraints due to large class size, negative attitudes, inadequate teacher training and lack of teacher collaboration.[162]

More qualified, better trained teachers, smaller class sizes, safe, orderly schools, and effective, adequate professional development are all necessary to serve regular education students well and, in turn, reduce inappropriate classification and segregation of special education students.

VII. NEW YORK CITY'S MOVEMENT TOWARD EDUCATION IN THE LRE

Over the past decade, two significant programs creating and supporting inclusive classrooms have been nurtured in New York City: the District 75 Office of Inclusive Education and the LRE Initiative.

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[158] New York School Construction Auth. Act. L. 1988, ch. 738 § 1.

[159] *Id.* at 49.

[160] *Id.* at 51-52.

[161] *Id.* at 57-60.

[162] Jane Liu & Darrell Pearson, Teachers' Attitude toward Inclusion and Perceived Professional Needs for an Inclusive Classroom, Educational Resources Information Center, document # ED438274 (1999).

A. District 75 Office Of Inclusive Education

Since 1991, District 75, the citywide district for children with severe and multiple disabilities, has been developing inclusion programs in coordination with community school districts and individual schools. These programs provide full-time inclusive education in age appropriate general education classrooms for approximately 1,100 to 1,200 of the 20,000 District 75 students. The District 75 Office of Inclusive Education provides staff, services, professional development, and funding for team collaboration. Its five Borough Facilitators give on-site technical assistance and information.

The Office of Inclusive Education (OIE) identifies three factors in a successful inclusion program:[163] on-going professional development, collaboration between all staff assisting the child in the inclusion program and implementation of a philosophy of inclusion that permeates the entire school. OIE provides the services of trained staff to collaborating school districts. "Borough Inclusion Facilitators" provide borough-, district- and school-level technical advice, professional development and facilitation to the instructional teams working with the inclusive class, the school administration and to parents. These facilitators promote methods of instruction that support all children in inclusive classrooms, including multi-level instruction, recognition of multiple intelligences, positive behavior approaches and cooperative learning. Special education teachers and paraprofessionals assigned from District 75 receive on-going professional development from District 75 and have regular meetings with the other District 75 special education teachers (referred to as "Methods & Resources" teachers) in the borough.

While different models of inclusion are practiced in OIE collaborations (e.g. the consultant teacher model, the team teaching model and the blended resources model), they share a commitment to on-going professional development and to on-going, regular collaborative planning to assess students' needs and services. Using IDEA funds, District 75 subsidizes common planning time for the student's instructional team during non-school hours. In the most effective programs, planning is school-wide. The school assesses the needs of all its students, inventories the resources at its disposal, and plans the most effective model for education and service delivery for all students. Students, parents, teachers, paraprofessionals, service providers and the administration are informed and committed to the philosophy of educating all children in their least restrictive environment.

Ironically, District 75, which deals only with the more severely disabled students, is regarded by many as doing the most successful job of integrating students with disabilities in regular classrooms. This is further evidence that many of the children the system now labels and segregates can learn in a well-run inclusive general education classroom. As the city moves towards a unified system of delivery of special education services, some might question the maintenance of a separate citywide school district for the "more disabled". However, District 75's Office of Inclusive Education has provided an effective, albeit

[163] Telephone conversation with Cathy Rikhye, Director of the Office of Inclusive Education, July 19, 2001.

limited, model for how to implement successful inclusion. Its programs and expertise should be expanded to benefit all students.

B. The LRE Initiative – 1996 to 2000

In November of 1996 Chancellor Rudolf Crew issued a Strategic Plan for Special Education emphasizing the need to provide supports and services to students in general education, eliminate unnecessary referrals to special education, and raise standards and improve results for students with disabilities. Part of the Plan was the "LRE Initiative", launched in the 1996-97 school year. The initiative was intended to provide schools in participating districts with opportunities to create and promote innovative instructional programs, including inclusive classes and collaborative team teaching, to educate students with disabilities in the LRE. The goal was ultimately to increase opportunities for students with disabilities to be served in the LRE.[164] Expertise developed through those efforts would then be used to inform and encourage growth in and beyond those districts. Beginning with Districts 15 and 22, the initiative expanded over three years to include almost half of the city's community school districts.

Participating districts were required to select four schools to participate, and four additional schools in each successive year. The Board gave detailed guidance for planning and providing training the first year of participation, but failed to require effective oversight or consistency in continued implementation.[165] The result was a patchwork of different models of varying quality.[166] Planning was sometimes arbitrary; for example, advocates received complaints that schools offered early-grade students instruction in integrated settings but did not provide integrated classes on the next grade level when those young people were promoted, thus relegating the students once again to self-contained classes. Despite its limitations, the LRE Initiative is now being considered the pilot program for the new Continuum of Special Education Services.

VIII. THE NEW CONTINUUM OF SPECIAL EDUCATION SERVICES

In June 2000 the New York City Board of Education adopted a new Continuum of Services requiring that all students with disabilities be given an appropriate education in the LRE.[167] In doing so the Board, at least nominally, has raised expectations for all children,

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[164] Memorandum from Burton Sacks and Francine B. Goldstein to Community School District Superintendents et al., Increasing Opportunities For Students With Disabilities To Be Educated In Their Least Restrictive Environment, March 22, 1999.

[165] *Id.*

[166] For program descriptions, *see* Board of Educ. of the City of New York, Least Restrictive Environment Initiative Directory of Participating Schools and Sample School Descriptions, Spring, 1999, and its December 1999 Update.

[167] New York City Board of Education, "Getting Started"-- Special Education as Part of a Unified Service Delivery System, the implementation plan for the new Continuum, is available at (and was viewed on August 24, 2001) <http://www.nycenet.edu/spss/sei/gs.pdf.

and is seeking to ensure access to the general education curriculum for a greater number of children with special needs in the City. The Executive Summary to the new Continuum holds the document out as a means of affecting a "vision for a single, seamless and unified service delivery system for all students." If achieved, this would amount to a revolution in special education in New York City.

A. The Pre-Existing Continuum Of Services

Under the "old" Continuum of Special Education Services (which is the continuum through which most students are still receiving services) students receiving special education services in New York City have few options for service delivery in general education classrooms. Students needing only related services such as speech therapy, occupational therapy, physical therapy, counseling, and hearing education or vision services can receive those services while being otherwise educated in general education classrooms. Yet, more often than not those related services are delivered as "pull-out" services, whereby the children are taken from their classrooms for a specified amount of time each day or each week to receive services somewhere else in the school building apart from their general education peers.

Some children with learning disabilities who require small group instruction in specific areas – specifically math and reading – are pulled out of their class for a specified time daily or weekly for resource room (initially mandated through *Jose P.*), where they receive small group self-contained instruction alongside other children with disabilities. The sizes of these tutoring groups are often as great as 8 students to one teacher, and cannot provide the intensive instruction students need to keep up with the general education curriculum. Additionally some students receive consultant teacher services from a special education teacher in their general education classroom for some percentage of the school day or week. However students typically receive the bare minimum—2 hours per week—of such consultant teacher services, and there is little coordination between general education and special education service providers. Outside District 75 programs, paraprofessionals are poorly trained, and frequently act as bouncers or bodyguards for students rather than as integrated teaching staff.

Beyond that, all students requiring special education services receive them in full-time, self-contained settings run by the community school districts and high school superintendencies or by the Citywide District 75. There are nine different Modified Instructional Service (MIS) programs, self-contained classes in public schools, and eleven Specialized Instructional Environments (SIE) programs, typically separate schools housed in public schools, that serve children with special needs. Children are placed into specific programs by specific disability categories and by age. For example, any child receiving his or her services in a MIS I classroom is between 6.9 and 21 years of age, displays significant academic difficulties (on the high school level, severe academic difficulties) and is no more than mildly mentally retarded.[168] Students whose full scale IQs dip below the mild mental

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[168] New York City Board of Education, Educational Services for Students with Handicapping Conditions, 121-125 (1991).

retardation level (from 52, for example, to 49) are whisked into MIS V classes for mentally retarded students without consideration of whether such programs are beneficial.

There is little flexibility to combine any of these placements to meet children's individualized needs. General education schools rarely permit mainstreaming by children with disabilities who have been placed in the more restrictive placements. Students in self-contained classes typically cannot receive resource room tutoring, although they might need the intensive instruction it supposedly offers. Students in general education typically cannot receive both resource room and consultant teacher. Program options are defined not by need, but by codes on placement forms.

In short, under the old continuum of services, the emphasis is primarily on categorization of the child based on his/her disability and service delivery in self-contained settings. Within this categorization, administrators have a highly regimented series of program options, with little flexibility to go beyond them. If the new Continuum is to succeed, not only the written options, but also the mindset of administrators across New York City, must change.

B. The New Continuum Service Delivery Options

The new Continuum of Special Education Services, adopted by the Board of Education in June of 2000, focuses on deciding which services each child needs rather than deciding on a disability and program category. It lays out a more flexible spectrum of options for delivery of services, from pre-referral targeted aids or supports and services for children who remain in the general education classroom, to special self-contained classes for those children who require more individualized and structured settings to learn. Any one of these settings may be the LRE for an individual child depending on the child's specific needs.

The new Continuum differs from its predecessor in its emphasis on providing services in the LRE. It emphasizes strategies and services to maintain students in general education in order to avoid unnecessary or inappropriate referrals to special education. Each school must establish a Pupil Personnel Team (PPT), a committee responsible for the review and evaluation of the needs of students having difficulty in general education. The PPT works in coordination with School Based Support Teams to identify and provide services and interventions. These may include all educationally related support services, reading interventions, remedial instruction and various behavioral support or social skills programs.

For a child referred to special education, the new Continuum provides for a number of ways to serve him or her in the general education environment – either in general education with related services, with special education teacher support, or in a team teaching situation. Below, very briefly described, are the three ways of maintaining students with special needs in general education classrooms provided by the new Continuum:

1. General Education With Related Services - Related services are developmental, corrective and other support services required to help a student with a disability to benefit from instruction in the general education curriculum in general education classes including, but not limited to: counseling, hearing and vision education services, occupational therapy, orientation and mobility services, physical therapy, health services, speech and language therapy, and various kinds of paraprofessional support services.

2. General Education With Special Education Teacher Support Services - Special Education Teacher Support Services are specially designed, supplemental instruction provided by a special education teacher working directly with a student with a disability or indirectly with the student's general education teacher. These services were formerly provided either through consultant teachers working with the student and his/her general education teacher, or through resource room services.

3. Collaborative Team Teaching - In Collaborative Team Teaching classrooms students with disabilities and general education students are educated together with a full-time general education teacher and a full-time special education teacher who collaborate throughout the day working simultaneously to adapt and modify instruction for the students with special needs while assuring the entire class has access to the general education curriculum.

Self-contained "special" classes will still be available for those children who the Board determines need the structure of a smaller, self-contained classroom with extra staff. However, while some of the self-contained special class ratios and class descriptions under the new Continuum are quite similar to those under the older version, gone are the old MIS and SIE labels. The new Continuum requires placement by academic and educational needs and specifically prohibits placing children solely on the basis of disability categories.

C. Implementation Of The New Continuum

Implementation of the new Continuum is expected to take a number of years.[169] During this first year (2000-01), schools and districts were charged with the following: establishing Pupil Personnel Teams; establishing Least Restrictive Environment Committees to develop plans for addressing new service delivery options; initiating district and school planning for moving children whenever appropriate to their home zone schools; initiating and conducting on-going professional development activities and parent and School Leadership Team information sessions. Since February 2001, Committees for Special Education (CSEs) and School Based Support Teams were to begin reviews of student IEPs to make recommendations consistent with the new Continuum. The Board's plan is to address the needs of all students with disabilities and appropriate delivery of services under the new

[169] Most administrators have characterized as optimistic the timeframe set out in the Board's implementation plan -- New York City Bd. of Educ., "Getting Started" Special Education as Part of a Unified Service Delivery System 2, enclosed in Memorandum of Francine B. Goldstein to all Superintendents, Transition to the New Continuum – Special Education Services as Part of A Unified Service Delivery System, December 12, 2000.

Continuum for students as they come up naturally for their reviews (annual reviews, triennial reviews, and initial or requested reviews). Over the summer months of July and August 2001 schools and districts were expected to reorganize special education services consistent with the students' IEPs for the district, so that in September 2001 students whose IEPs have been amended will, in fact, receive services under the new Continuum options.[170]

The Board of Education still has a great deal of work to do to make this plan a reality. Parents and advocates around the city indicate that in the 2000-01 school year, many CSEs still have not made recommendations for next year consistent with the new Continuum. In those districts where some level of implementation is in effect, problems abound. CSEs make recommendations for new continuum options without knowing what those classes will look like. Parents are unable to see the classes to decide whether they are appropriate for their children. Parents are still not provided with profiles of the students in the classes to which their children are assigned, so that without the old MIS and SIE labels, they only know the staffing ratio of the class assignment and nothing more. CSE Administrators still put students they think of as MIS II children or MIS V children into the same classes, but without classroom labels parents no longer know that they are doing this. Districts are misinterpreting the preference for educating students with special needs in their home zone by removing children without consent from their current placements and placing them in home school placements. General education teachers and principals still express the belief that special education children are not their children, but are instead the responsibility of special education staff and paraprofessionals.

Board officials generally express the belief that it will take at least three to five years or more to reach full implementation of the new Continuum, and the Board is continually revising this timetable. No one imagines that this transition will be easy, but some pitfalls can be anticipated and avoided by careful planning and adequate funding. School districts must conduct intensive and on-going professional development for all teachers, administrators and service providers. Parents of all students must be informed and included in planning. The Board of Education and the advocacy community must continue monitoring the schools as the new policy takes effect, to assure that services and resources are provided to enable students with and without special needs to succeed in inclusive classrooms.

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[170] Goldstein memorandum, *supra* note 159.

CONCLUSION AND RECOMMENDATIONS

The Least Restrictive Environment Coalition commends the New York City Board of Education for adopting a new Continuum. The new Continuum offers an opportunity for all children to receive a quality education together. But the information in this report amply demonstrates that there is still a long way to go before children with disabilities in New York City are afforded the sound, basic, non-discriminatory education that is their right. Simply placing children with disabilities in general education classrooms without offering them, their teachers, and their parents the necessary support and resources will be a recipe for failure. We must all work together to ensure that children with disabilities are finally offered the truly individualized education they need.

In the new Continuum, the Board espouses a policy committed to educating each child in his/her LRE, with appropriate services, supports and accommodations. The policy supports development of a whole-school approach to service delivery, including "a flexible curriculum within the context of system standards, a trained and diverse teacher and support staff population, a school-wide approach to behavioral issues, a collaborative effort to serve all students in the school and an end to labeling students as a way of removing them from general education classrooms in order to receive services."[171]

For the new Continuum to succeed in moving students into the least restrictive settings appropriate to meet their needs, it must be implemented with adequate resources and appropriate staffing, sufficient professional development to support teachers, information to ensure parents of children with disabilities are informed about their children's educational needs and services, and sufficient outreach to all parents to create a welcoming atmosphere for all children. Essentially, systemic reform is necessary to shift from the paradigm of segregation currently operating in the City school districts to that of inclusion. System oversight by an informed and supportive administration is critical. The LRE Coalition looks forward to working with the New York State Department of Education, the New York City Board of Education, school administrators, teachers, parents and other advocates to implement the new Continuum for the benefit of all children.

To that end, and in furtherance of the creation of a school system that delivers a sound, appropriate education to all of its students, the Least Restrictive Environment Coalition makes the following specific recommendations:

I. PROFESSIONAL DEVELOPMENT: WELL-TRAINED TEACHERS ARE NECESSARY TO ENSURE SUCCESSFUL IMPLEMENTATION OF THE NEW CONTINUUM

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[171] Special Education Services as Part of a Unified Service Delivery System (The Continuum of Services for Students with Disabilities), executive summary, New York City Bd. of Educ. (2000).

While the Board has been attempting to provide professional development on the new Continuum, such training has not begun to scratch the surface of what is needed to enable the new Continuum service plan to succeed.

A. A Comprehensive System of Personnel Development

The IDEA mandates that the State Educational Agency adopt a Comprehensive System of Personnel Development for all teachers and professionals who provide special education and related services for children with disabilities. The local educational agencies are required to adopt personnel development measures in accordance with the state plan. Yet, New York State does not have a personnel development system that adequately meets the statutory mandates. The New York State Education Department should develop a system of personnel development adequate to ensure that there is a sufficient supply of trained teachers and professionals to meet the needs of children with disabilities in New York City.

B. Training to Prepare General and Special Education Teachers to Teach in Inclusive Settings

General and special education teachers must be taught strategies for delivering instructional services in inclusive classrooms and settings. Without this training, inclusion will be in name only. For example, teachers must be trained in research-based pedagogy for the inclusive classroom, classroom management, and identification of learning disabilities. Special education teachers who formerly delivered consultant teacher and resource room services outside a classroom in groups must learn how to deliver those services on a push-in basis and strategies for working more closely with the child's teachers. Teachers who will be paired together in team-teaching classes must learn how to teach all children together and how to revise curricula, lesson plans, teaching strategies and assignments to meet the needs of diverse student groups. Principals and other administrators must be trained in the theory and practice of inclusive education, including efficient staffing. This information must be incorporated into the curricula of educational programs for new teachers and administrators as well as be part of wide-spread, on-going professional development of existing school system staff.

C. Training Designed to Prepare General Education Teachers to Teach Students with Special Needs

General education teachers must be provided extensive professional development at the local level to prepare them for how to deliver instruction to students with the full range of disabilities. In addition, on a statewide level, changes to the requirements for teaching in general education classrooms are needed to incorporate a broader range of requirements geared toward teaching students with special needs. In particular, general education teachers must learn behavior management techniques and strategies and research-based methods of teaching differently-abled learners.

D. Training Designed to Improve the Quality of Special Education Teachers & Providers

We recommend that additional professional development be provided at the local level targeted to deliver information and support to all teachers on using the newest, research-based methodologies for instructing students with special needs.

State certification requirements should also be changed, so that special education certified high school teachers also become certified in a particular subject area(s), to bring them in line with general education high school teachers. Currently, teachers who are special education certified are not certified to teach in any particular subject area. This means that a special education teacher might be as likely to be teaching reading as math, social studies, or biology—an absurdity in the high school general education context. This lack of subject matter training is surely a contributing reason as to why so many children with disabilities who are taught in segregated environments do not come close to meeting the regular education standards.

Paraprofessionals' training must include strategies for collaborating with the teacher and working with students with different disabilities. All school staff must be trained in effective behavior management.

E. School-Based Behavior Management Training That is Mandatory for All School Staff

A significant obstacle to providing instruction in the LRE has been the lack of training for school staff on behavior management in the classroom and during extracurricular activities. Students are often referred to segregated special education classrooms due to teachers' inability to manage their behavior, despite the fact that those children would be capable of meeting academic standards with the appropriate support.

Teachers are not required to participate in significant behavior management training programs in order to become certified. As a result, behavior and discipline are significant problems for teachers. The solution is increasingly geared toward removing students from the classroom. Yet, research shows that the majority of disciplinary incidents in schools can be traced back to the way the student was handled by school staff.[172]

There are cost-effective, research-based programs available that are designed to provide building-level training for teachers, school aids, and school administration to assist them in managing children's behavior. For children receiving special education, behavior management to maintain students in the LRE is legally required, yet school-based training would benefit all students. These research-based training programs would not only reduce the number of students being placed in segregated classrooms; they would also reduce special education referrals, and raise test scores.[173]

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[172] U.S. Department of Education, Grant Competition to Reduce Student Suspensions and Expulsions and Ensure Educational Progress of Suspended and Expelled Students, OMB # 1810-0551, CFDA #84.148M, 6/200, at 10.

[173] Jay Gottlieb & Susan Polirstaok, A Schoolwide Staff Development Program to Reduce Misbehavior in Inner City Elementary Schools, at 3 (manuscript on file with Advocates for Children.

F. Professional Development in Research-Based Methodologies and Strategies for Reading Instruction

Many children who are currently in self-contained placements began receiving special education services as a result of an inability to read. Because these children never received appropriate effective intervention, their needs for special education services grew, as they made no progress, since basic reading is the key to most other schoolwork.

In the past ten years, there have been many new developments in instructional techniques and technology geared toward teaching reading. Teaching reading effectively to diverse general education students and students with special needs requires teachers able to adapt curricula appropriately. All teachers must learn the most successful methods of teaching reading to struggling students.

Multisensory and other instructional methodologies must be incorporated for the thousands of children who have difficulty reading because of disabilities such as dyslexia and other learning disabilities. Use of these strategies would allow the student to stay in a general education classroom, progress and have no need for expensive, and usually dead end, segregated placements.

G. Professional Development for Board of Education Evaluators

All too often, children's disabilities are not appropriately identified by evaluation professionals or individuals who are able to recommend instructional strategies to address the child's disability. In fact, despite the fact that the IDEA mandates that an individual who can interpret the instructional implications of a child's evaluation must participate in IEP meetings, the Board generally does not include specific instructional strategies in a child's IEP. Moreover, based on several Coalition members' experience in working with individual families, it appears that many teachers, general and special education, do not see their students' IEPs, and teachers rarely, if ever, see students' special education evaluations. As a result, many children are not receiving instruction tailored to their individual needs. Evaluation personnel must be trained in effective testing for all disabilities and for recommending specific instructional strategies for meeting individual goals.

H. Provision of Mentoring and Technical Assistance

Professional development should not be limited to isolated courses and training sessions. The use of master teachers and mentors with expertise in teaching in a diverse and inclusive classroom is highly recommended to support less knowledgeable or less confident teachers in this new endeavor.

Districts and principals will need on-going technical assistance on how to provide for all the students' needs most efficiently, including staff deployment and budgeting for new staffing models.

Properly implementing federal LRE requirements is a significant adjustment for most districts and schools. They will need assistance from inclusion experts. Cadres of such

experts (much like those that currently exist through the District 75 Office of Inclusive Education) need to be available for assistance in creating programs.

I. Consultation Time

Time for collaborative planning between teachers must be provided. Inclusion and team teaching require collaborative planning between special and general education teachers, paraprofessionals and service providers, as well as other professional staff.

II. PLANNING & RESOURCES: EFFECTIVE PLANNING AND ADEQUATE RESOURCES ARE NECESSARY TO IMPLEMENT THE NEW CONTINUUM EFFECTIVELY

A. Planning on All Levels of the School System

The Board should engage in proper planning for implementing the new Continuum. As of this report, the Coalition has seen very little in the way of school wide or district wide planning. There appears to be widespread confusion in the districts about how to implement recommendations made under the new Continuum. Planning is essential for successful implementation of the LRE mandate; without it, there will not be successful implementation of the new programs and services.

Under the Board's procedures for implementing the new Continuum, all schools were required to create LRE Committees, which are made up of school personnel who are charged with creating a cohesive school- wide plan. This plan is to be incorporated in the Comprehensive Education Plan (CEP) that each school must create and provide to the district Superintendent. The Superintendent uses the school-based CEPs to create a District CEP, which is to include a district-wide LRE plan.

However, it is the Coalition's belief that this planning process is at varying levels of implementation. Some schools have already developed active LRE Committees and incorporated well-crafted LRE plans into their CEPs, while other schools have not taken any steps toward planning. Similarly, some districts are developing plans for district-wide changes, while others have hardly approached the issue.

And although the new Continuum encourages moving children with disabilities back to their home districts, there has been little, if any, inter-district planning or procedures implemented to enable districts to ascertain whether appropriate programs exist to ensure smooth transition back to local schools.

B. Ensure Opportunities for Inclusive Programs in the Early Grades and Continuity from Year to Year

Inclusion should start from preschool or the early elementary grades. It is usually easier to have children with disabilities start in a general education setting rather than have to transfer into one in later years from a segregated setting. Additionally, an inclusive program needs to be followed year after year so a child with disabilities who is progressing well in the general education environment is not shunted into a restrictive setting and back again because of a lack of planning.

C. The Shortage Of School Personnel Must Be Addressed

There is a serious shortage of certified teachers, principals and other educational service providers throughout New York City, but nowhere is it felt more keenly than in the service area of special education and, in particular, bilingual special education. Related service providers, such as speech and occupational therapists, are also in short supply. As a result, thousands of children are unserved or underserved and are taught by teachers who do not have the appropriate level of training and expertise. With more children with disabilities in general education with supports, certain key services, such as paraprofessionals and special education teachers providing support services, may be in even greater demand.

The reasons for the existing shortages are complex and are beyond the scope of this report. Yet, in order for the ideals of the new Continuum to materialize, both New York State and New York City must develop mechanisms to address these shortages. Without a sufficient number of qualified staff to evaluate children and deliver high quality services, the promise of the IDEA cannot be kept.

D. Resources are Needed for Instructional Materials and Assistive Technology.

In light of the changes in New York State learning standards, instructional materials that provide access to the general curriculum should be made available to all students receiving special education services in self-contained classes.

In the experience of many of the LRE Coalition members, assistive technology (such as computers and software, or adaptive devices) is seriously underutilized, as Committees on Special Education do not recommend or follow through on recommendation for Assistive Technology (AT) evaluations unless a child is mobility, hearing or visually impaired. There are thousands of children with other disabilities who would benefit from AT. In order to keep children in inclusive classes AT should be utilized much more heavily than is currently the case.

III. PARENT INVOLVEMENT AND INFORMATION IS KEY TO THE SUCCESS OF INCLUSION

Research has demonstrated that parent involvement is critical to educational success, and parent buy-in is critical to creating a truly inclusive school community. Moreover, the IDEA mandates that parents are full participants in their child's education and are provided full notice of their rights and entitlements to services. Parents whose first language is not English are also entitled to receive information in their own languages.

The Board should ensure that parents are fully involved in the IEP and placement process, which will encourage parental acceptance of school programs. To assure parents are involved, all information necessary to make informed decisions about their children must be provided to them.

Many parents do not receive all the information they should, and parents whose first language is not English are those least likely to receive information, particularly about the

new continuum. Thus, parents of children with disabilities must be provided as much information as possible about the new Continuum, the issue of LRE and how to access services for their children, including their rights in the special education process. This information must be provided in languages that all parents can understand.

Moreover, the 1997 amendments to the IDEA mandated that parent training should be made available to help parents understand the nature of their child's disability. This entitlement of the IDEA should be fully implemented in New York City.

Many parents of children in general education and school staff have misconceptions about the meaning of LRE and the impact of educating children with disabilities with their non-disabled peers. Parents of students who do not have disabilities fear that inclusion will have a negative impact on the achievement of their children. There are underlying discriminatory attitudes toward children with disabilities that interfere with the expansion of inclusive programs. Thus, the whole school community – staff, students, and parents - should be provided information on and trained regarding the benefits of LRE and inclusion classes for all children.

IV. MONITORING AND ACCOUNTABILITY: MONITORING AND ACCOUNTABILITY OF SCHOOLS AND DISTRICTS IS VITAL TO ENSURING SUCCESSFUL IMPLEMENTATION OF THE NEW CONTINUUM

The Board currently maintains pupil data on outcomes, achievement, ethnicity, English Language Learner status, and special education referral/placement/enrollment and disability category as is required by the Jose P. class action, state and federal law, but to make sure the LRE mandate is being properly implemented much more needs to be done.

The Board must exercise active oversight to ensure that District Superintendents and Committees on Special Education are committed to implementation of the new Continuum. Though the new Continuum is only in its infancy, it appears that each district has a different idea of what it means and is implementing (or not implementing it) in widely disparate manners. The Board's Office of Monitoring and School Improvement's "District Liaisons" should undertake to ensure that, to the extent that Committees on Special Education have recommended programs and services under the new Continuum, those programs and services are made available to students in a timely manner.

To promote school district accountability, the State should require the data currently submitted to it by New York City to be disaggregated and submitted by community school district, roving districts (such as District 75 and District 85) and High Schools by borough, rather than treating New York City as one school district.

Data collected should be transparent and posted on the Board and NYSED websites and be searchable on-line. This information is tremendously valuable to educators and administrators for self-assessment and to researchers who could provide additional cost-free oversight for the system.

Reports tracking how many children have moved into less restrictive or more restrictive environments must be followed by rigorous monitoring and analysis, including intra-district analyses of how particular schools are doing.

State and federal monitoring requirements should be consolidated and standardized to eliminate duplicative paperwork.

V. CONTINUE TO ADDRESS QUALITY OF SEGREGATED PROGRAMS

The LRE for a minority of children with disabilities will be a segregated classroom. Thus, these programs must still be provided for children who would not academically or socially progress in a general education environment. Many of these segregated programs currently are of poor academic quality, with low expectations and little-to-no access to the general education curriculum.

The general education curriculum must be taught in segregated classes and programs to the greatest extent appropriate. Segregated programs must also be improved for those whose children who are not able to meet general education standards. Expectations for outcomes in segregated classes should be high but achievable and classes should be evaluated on their success in meeting students' goals.

The State must expand its list of funded private day and residential programs that provide services that unfortunately are not currently available in public schools. Currently, the need for these programs is much higher than the number of available seats. Additionally, the process to receive a seat must be streamlined to allow for improved equality.